Supreme Court, U.S.
FILED
07-1012 FEB 1 - 2008
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

CHARLES ALFORD,

Petitioner,

v.

CUYLER LARUE WINDHAM, JR., ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

BRIAN D. ROGERS
Counsel of Record
MICHAEL L. GOLDBERG
ROGERS & GOLDBERG, LLC
3155 Roswell Road
Suite 330
Atlanta, Georgia 30305
(404) 846-5516

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether under the Fourth Amendment, an injured person can demonstrate that a police officer acted objectively unreasonable in using deadly force by proving that the officer's subjective reason for believing that the person posed a serious risk of harm is unreasonable given the mandate in *Graham v. Connor* that the subjective intent of an officer is irrelevant.

PARTIES TO THE PROCEEDINGS

Petitioner is Charles Alford.

Respondents are Cuyler Larue Windham, Jr. and Sheriff Earl L. Butler.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT	2
REASONS FOR GRANTING OF THE PETITION	6
CONCLUSION	12

APPENDIX

Circuit Court Opinion	App. 1
District Court Decision	App. 30
Order Denying Rehearing	App. 47

TABLE OF AUTHORITIES

Page

CASES

Alexander v. City and County of San Francisco, 29 F.3d 1355 (9th Cir. 1994) 11

Carr v. Tatangelo, 338 F.3d 1259 (11th Cir. 2003) 11

Graham v. Connor, 490 U.S. 386 (1989).....2, 6, 7

Murray-Ruhl v. Passinault, 2007 WL 2478584 (6th Cir.) 9

Trahan v. City of Oakland, 960 F.2d 152 (9th Cir. 1992) 10

PETITION FOR A WRIT OF CERTIORARI

Petitioner Charles Alford respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals can be found at 2007 WL 2985297. It is reproduced in the Appendix at App. 1. The opinion of the District Court granting respondent's motion for summary judgment is unreported and is reproduced in the Appendix at App. 30.

JURISDICTION

The Fourth Circuit Court of Appeals opinion was entered on October 15, 2007. Appendix at App. 1. A timely petition for rehearing was denied on November 8, 2007 Appendix at App. 47. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment to the United States Constitution provides that: "The right of the people to be secure in their persons . . .

against unreasonable searches and seizures, shall not be violated . . . "

STATEMENT

The Fourth Circuit Court of Appeals erroneously held that a police officer's use of deadly force can be deemed reasonable based on a risk that the officer never saw, appreciated, perceived or thought to be true. Petitioner Charles Alford seeks review of the ruling of the Fourth Circuit Court of Appeals which held that the officer's proffered reason for believing that Alford posed a risk of serious harm to warrant the use of deadly force was irrelevant to the inquiry into the reasonableness of the officer's actions, even though the officer's reason for shooting Alford was vigorously disputed and objectively unreasonable. The Court of Appeals affirmed the district court's grant of summary judgment to Respondents on the grounds that a reasonable officer could have mistaken that Alford, who at one point was reaching towards a child to protect her, was reaching towards the shooter and thus posed a risk of serious harm. But the officer testified that he never saw or thought that Alford was reaching towards him with arms outstretched and gave an entirely different reason for shooting Alford.

Alford seeks review of the Fourth Circuit Court of Appeal's ruling because it has improperly interpreted this Court's holding in ***Graham v. Connor***, 490 U.S.

386 (1989) and is in conflict with the principles of this decision. Furthermore, this ruling is in conflict with the decisions of other Circuit courts and has decided an important federal question regarding the relevance of an officer's subjective reason for believing that a person posed a risk of serious harm to warrant the use of deadly force to the inquiry of the objective reasonableness of the officer's actions under the Fourth Amendment, and this question has not been, but should be, settled by this Court.

This petition arises out of the shooting of Petitioner Charles Alford during a raid by Officer Cuyler Larue Windham, Jr. Windham was part of a six-member special response team that entered a single-wide mobile home to execute a search warrant. Prior to entry, the SRT team threw a flash bang grenade into the residence. As the team entered through the back door into the kitchen area, Alford reached for a child who was running past him to protect her. Alford was then hit in the mouth by one of the officers. He was forced backwards by the blow and was shot two seconds later. Alford was unarmed, and there were no weapons in the residence.

Windham claims that when he entered into the kitchen area, he saw a large black female, later identified as Lakina Alford, next to the sink. He told the woman to get onto the ground. When she did not move, he tried to push her to the ground with his left hand while holding onto his sub-machine rifle in his right hand. The woman was not acting aggressively towards Windham but was frozen and was not

moving. Out of the corner of his eye, Windham saw Alford approaching from his left side. According to Windham, Alford was walking towards him and was not running with his arms outstretched or acting aggressively in any manner.

Windham pushed the female away from him and approached Alford. When he was an arms length away, Windham tried to push Alford to the ground with his left hand. Alford was not acting aggressively towards Windham but acted like he was frozen and was not going to the ground. Windham then felt the black female jump on his back. According to Windham, Alford then grabbed Windham's weapon and began to pull it back and forth. Windham pressed the trigger sending multiple bullets into Alford's right arm and chest because he feared losing his weapon. Charles Alford denies reaching towards or touching Windham's gun. Lakina Alford denies jumping on Windham's back or touching Windham in any manner. The testimony of the other officers in the raid and the other people in the residence confirm that Charles Alford did not grab Windham's gun and that Lakina Alford did not jump on Windham's back. According to Windham, the reason that he shot Charles Alford was because Alford had his hands on Windham's weapon at the same time that the black female was on his back attacking him.

On March 31, 2006, the U.S. District Court for the Eastern District of North Carolina Western Division granted respondents' motion for summary judgment on the grounds that Windham's actions in

shooting Alford were objectively reasonable since "when plaintiff rapidly approached defendant Windham while leaning forward with his arms outstretched, defendant Windham was forced to immediately decide whether plaintiff was attempting to assault him." Appendix App. 38. The District Court ignored Windham's own testimony as to the reason he used deadly force on Alford.

Alford appealed the decision to the Fourth Circuit Court of Appeals. In a split decision, the majority affirmed the grant of summary judgment holding that Windham's testimony as to the reason for shooting Alford was irrelevant to the inquiry into the objective reasonableness of Windham's actions even though Windham's basis for shooting Alford was vigorously disputed. "As Alford points out, Windham's fear that his gun may be turned against him and his fellow officers was created in large measure by Lakina's alleged attack from behind and Alford's alleged jostling of his gun. Both of these allegations are vigorously disputed." Appendix App. 12. The dissent took exception with the majority's ability to presume what a reasonable officer could have done under the circumstances without taking into account the conflict between Windham's version of the shooting and Alford's version of events. "Unfortunately, the majority fails at this endeavor, at times resolving certain disputed facts in Windham's favor. The majority also sets out a series of presumptions with which a reasonable police officer in Windham's position would have approached the trailer; yet, the majority

considers only those presumptions favoring the officer, ignoring any that favor Alford." Appendix App. 23. The Fourth Circuit subsequently denied a petition for rehearing en banc filed by Petitioner.

REASONS FOR GRANTING THE PETITION

A. The Decision in the Court Below Incorrectly Interprets *Graham v. Connor* and Undermines the Principles of this Supreme Court Decision

In ***Graham v. Connor***, this Court held that all claims that law enforcement officers used excessive force on a free citizen should be analyzed under the Fourth Amendment and its reasonableness standard. *Id.* at 395. In determining whether an officer acted reasonably under the Fourth Amendment, the test is an objective inquiry into the officer's actions. "As in other Fourth Amendment contexts, however, the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motive." *Id.* at 397. The subjective intent or motivation of the officer is irrelevant to the inquiry. "The Fourth Amendment inquiry is one of 'objective reasonableness' under the circumstances, and subjective concepts like 'malice' and 'sadism' have no proper place in that inquiry." *Id.* at 399. The good or bad intent of the officer does not affect the constitutionality of his actions. "An officer's

evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional." *Id.* at 397.

Although the question of whether an officer acted with "malice" or "in good faith" was held by the ***Graham*** court to have no role in determining the objective reasonableness of the officer's actions, the Court did not address the relevance of the officer's subjective reason for believing that the use of force was warranted (i.e. why did he pull the trigger) in the framework of this inquiry. However, the principle behind the ***Graham*** decision suggests that an officer's subjective reason for shooting a person is relevant. In ***Graham***, the Court held that the Fourth Amendment, instead of substantive due process, provided the constitutional framework for deciding an excessive force claim because it provided a clear rule for protection against this kind of conduct. "Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." *Id.* at 395. The Court was concerned that an amorphous substantive due process claim would lack consistency as compared to the more applicable reasonableness standard found in the Fourth Amendment. By eliminating the subjective intent of the officer as an element of the cause of action, the

Court created conformity in that each officer would be held to the same standard of reasonableness and would be found responsible whenever this standard was violated regardless of the officer's state of mind.

If the officer's subjective reason for deciding to use deadly force is not made a part of the reasonableness inquiry, the conformity sought and established by the ***Graham*** decision will be destroyed. Under the rationale espoused by the Fourth Circuit in the present case, an officer's decision to shoot a person would be considered objectively reasonable anytime that a "reasonable officer" in hindsight may have thought that the person's conduct placed the shooter at risk even though the shooter did not see or perceive this specific risk, or consider the person's particular actions as posing a threat. For example, an officer could testify that he shot a suspect when he entered the kitchen during a raid because the suspect reached towards his pants pocket where there was a bulge that looked like a gun. The suspect would testify that he had his back to the refrigerator and was raising his hands to hold them up and that there was nothing in his pocket and that he never moved his hands towards his pants. The officer would still be entitled to summary judgment because a reasonable officer may have thought that the suspect was reaching for a weapon on top of the refrigerator. The shooter would escape liability based on something he never saw, thought or believed to be true. These results would undermine the consistency of the reasonableness standard embraced by the ***Graham***

Court. Instead of concentrating on the basis of the officer's decision to use force, the summary judgment standard would turn on the number of possible hypotheticals that the district court could come up with as justifying the use of force.

B. Other Circuit Court Decisions Are in Conflict with the Fourth Circuit's Ruling

This Court has not yet had the opportunity to decide the relevance of the officer's subjective reason for using deadly force to the reasonableness inquiry since the ***Graham*** decision. While the Fourth Circuit has decided that the officer's testimony is irrelevant, other Circuit courts have reached the opposite determination. In ***Murray-Ruhl v. Passinault***, 2007 WL 2478584, the Sixth Circuit Court of Appeals recently held that the reason an officer decides to use deadly force is relevant to the reasonableness inquiry into his actions. In ***Murray-Ruhl***, the officer fired his weapon at an approaching vehicle that he claimed was trying to hit him and continued firing after the vehicle passed by him out of fear that the vehicle may hit another officer or the public in general. Witnesses disputed that the vehicle was close enough to the officer to be a threat and disputed that the vehicle was at risk for hitting anyone else after it went by the officer. The Court decided that the case needed to go to the jury to decide if the officer's reason for shooting the suspect was objectively reasonable. "In granting summary judgment to the defendants, the district court simply failed to acknowledge the conflicts in the

parties' allegations of fact concerning the reasonableness of Passinault's action in causing Murray's death, instead crediting the defendants' version of the events leading up to Murray's death. In doing so, the district court usurped the jury's function, deciding – in effect – that Passinault continued firing past the need to do so out of fear or concern rather than anger or frustration. The former, it seems to us, would be objectively reasonable if true, the latter would not." *Id.* at 6.

Similarly, the Ninth Circuit has indicated that the reason behind an officer's use of force is relevant to determining if the officer's story is believable and ultimately whether the officer actually had a valid reason to use the amount of force exerted in the situation. "Even though subjective motivation is immaterial, ***Graham*** notes that evidence that the officer harbored ill-will might properly be considered by the factfinder in assessing the credibility of an officer's account . . . This dictum means that even though intent is not an element of excessive force, evidence of intent may be relevant to whether objectively excessive force was used." ***Trahan v. City of Oakland***, 960 F.2d 152 (1992). In the Ninth Circuit, the decision of whether force was reasonable can turn on whether the jury believes the officers' claimed reasons for using the force.

> If the jury were to find that the officers entered in order to help the inspectors inspect – as defendants contend on appeal – then the jury may also conclude that the force used (deployment of a SWAT team) was excessive

> in relation to the purpose for which it was used (ensuring the immediate execution of a forcible entry inspection warrant). On the other hand, if the jury were to conclude that the officers entered for the purpose of arresting Quade, they may conclude that storming the house was in fact commensurate with need (arresting a man who had threatened to shoot anyone who came into his house), and hence that the force was reasonable.

Alexander v. City and County of San Francisco, 29 F.3d 1355, 1367 (1994).

The Eleventh Circuit has indicated in dicta that the reasonableness inquiry should include the "reasonable apprehension" of the officers in determining if force was excessive.

> Carr and Wymbs have taken issue with the district court for considering the officers' responses and reactions to their respective perceptions that Carr or Wymbs was pointing a gun and chambering a bullet at Officer Tatangelo. Yet, Graham requires an evaluation of the officers' reasonable apprehension to assess their responses to the circumstances confronting them, particularly in rapidly evolving situation.

Carr v. Tatangelo, 338 F.3d 1259, 1268 (2003).

The Fourth Circuit stands alone as the only circuit that has specifically held that the officer's basis for the use of force has no bearing on the issue as to whether the force is excessive. In doing so, it has

created a dangerous precedent. A precedent where an officer can shoot a person and then escape liability based on a presumption about a risk the officer never saw, perceived, or thought to be true. This Court should intervene to stop this precedent before it spreads to other Circuits and resolve the conflicts over this important issue once and for all.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

BRIAN D. ROGERS
Counsel of Record
MICHAEL L. GOLDBERG
ROGERS & GOLDBERG, LLC
3155 Roswell Road
Suite 330
Atlanta, Georgia 30305
(404) 846-5516

Attorneys for Petitioner

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-1569

CHARLES ALFORD,

Plaintiff-Appellant,

versus

CUMBERLAND COUNTY, NORTH CAROLINA; CUMBERLAND COUNTY SHERIFF'S DEPARTMENT; EARL L. BUTLER, Sheriff; CUYLER LARUE WINDHAM, JR., Individually, and in his official capacity as an Officer of the Cumberland County Sheriff's Department,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at New Bern. Louise W. Flanagan, Chief District Judge. (5:04-cv-00108-FL)

Argued: May 22, 2007 Decided: October 15, 2007

Before WILLIAMS, Chief Judge, GREGORY, Circuit Judge, and Benson Everett LEGG, Chief United

States District Judge for the District of Maryland, sitting by designation.

Affirmed by unpublished opinion. Judge Legg wrote the majority opinion, in which Chief Judge Williams concurred. Judge Gregory wrote an opinion concurring in part and dissenting in part.

ARGUED: Michael Louis Goldberg, ROGERS & GOLDBERG, L.L.C., Atlanta, Georgia, for Appellant. Reginald B. Gillespie, Jr., FAISON & GILLESPIE, Durham, North Carolina; Ronnie Monroe Mitchell, MITCHELL, BREWER, RICHARDSON, ADAMS, BURGE & BOUGHMAN, Fayetteville, North Carolina, for Appellees. **ON BRIEF:** Douglas E. Canders, Grainger R. Barrett, CUMBERLAND COUNTY ATTORNEY'S OFFICE, Fayetteville, North Carolina, for Appellees Cumberland County, North Carolina, Cumberland County Sheriff's Department, and Earl L. Butler, Sheriff.

Unpublished opinions are not binding precedent in this circuit.

LEGG, Chief District Judge:

Charles Alford ("Alford"), who was shot in the confusion of a drug raid, filed the instant civil rights suit. Alleging the use of excessive force, he sued the officer who shot him, Sgt. Cuyler Larue Windham, Jr.

("Windham"). Following discovery, Windham moved for summary judgment on the ground of qualified immunity. The district court granted the motion. The court also dismissed Alford's state law claims and his claim that defendant Earl L. Butler ("Butler"), the Sheriff of Cumberland County, failed to train and supervise his deputies properly.[1] This appeal followed. We affirm the district court's decision.

I.

As will be discussed, many of the facts surrounding the raid are contested. The following facts, however, are not reasonably in dispute.

During the early evening of February 27, 2003, members of the Sheriff's Office Special Response Team ("SR Team") prepared to execute a federal search warrant at a mobile home where crack and powder cocaine were being sold. Briefers advised the SR Team that Janet Alford ("Janet") lived in the home with her two adult children, Lakina Alford ("Lakina") and Garry Alford ("Garry"). Janet, Lakina, and Garry all had drug convictions. Although Alford denies the accuracy of the report, the briefer also advised the SR

[1] Prior to discovery, the district court dismissed (1) Alford's § 1983 claims against Cumberland County and the Cumberland County Sheriff's Department ("CCSD"), (2) his punitive damages claims against Cumberland County and the CCSD, (3) his respondeat superior claim against the CCSD, and (4) his claims against Windham in his official capacity. Alford did not appeal the dismissal of these claims.

Team that shots had been fired at the house a week before.

The officers assembled at a spot where they could observe the house without being detected. They observed foot and car traffic to and from the house. (J.A. at 245.)[2] At around 7:30 p.m., a police informant, Beverly Hendrix, entered the house to buy crack cocaine. She left the house a half an hour later, met the officers, and handed over the drugs. Hendrix advised her contact, Officer Gary Owens, that there were nine people, including two children, in the small house.

Several minutes later, six members of the SR Team approached the front door. According to the officers, Corporal Paul Spiegler ("Spiegler") repeatedly banged on the side of the trailer, shouting, "Sheriff's Office, search warrant." There was no response, except for the sound of footsteps inside. The officers then struck the front door with a battering ram, forcing it open eight to twelve inches. Someone inside the trailer, apparently Willie Alford, the plaintiff's father, slammed the door shut.[3]

---

[2] Citations to the "J.A." and "S.A." refer, respectively, to the contents of the joint appendix and supplemental joint appendix filed by the parties in this appeal.

[3] Neither Willie Alford nor anyone else in the house reported hearing the officers identify themselves as police. At the time of the raid, Charles Alford was playing solitaire on a computer some eight feet from the front door. During his

(Continued on following page)

Upon meeting resistance at the front door, the officers ran to the rear of the trailer and lined up at the back door. Sergeant Charles Parker ("Parker") kicked it open. Deputy Paul Meade ("Meade") tossed a flashbang grenade into a small laundry room just inside the entrance. The grenade detonated, producing a loud, disorienting noise, a flash of light, and obscuring smoke.

Hard on the heels of the flashbang grenade, the officers entered the trailer in the following order: Parker, Meade, Windham, Officer David Borreson, Deputy John Leggette ("Leggette"), and Spiegler. Parker, the first officer inside, went through the laundry room and turned left into the kitchen. Meade, a few seconds behind, went through the laundry room and turned right into a bedroom. Windham and Leggette followed Parker into the kitchen, while the other officers followed Meade into the bedroom. Windham was armed with a machine pistol that he carried in his right hand. The pistol was supported by a strap that hung from his left shoulder and ran across his body.

The officers shouted "Get down" as they breached the house.[4] Shortly after Windham entered the

---

deposition, Alford could not recall whether he heard banging and shouting at the front door.

[4] Windham and Parker both testified that they shouted "get down." Although Alford does not remember hearing this (J.A. at 442), his father testified that the officers shouted, "Get down on the floor all of you. I'll kill all of you M.F.S.B.'s." (J.A. at 690.)

(Continued on following page)

kitchen, he encountered Alford coming towards him, arms outstretched. Alford did not live in the trailer, but was visiting. Windham moved towards Alford, and, a few seconds later, fired a burst of three shots. Alford was struck in the right arm and abdomen. The shot that hit Alford's right forearm also grazed his right hand. According to the uncontroverted forensic report, the muzzle of the pistol was no more than twelve inches from Alford's forearm when the shot was fired. (S.A. at 252UU.) Alford's right hand must have been even closer.

Although the parties agree on the basic facts outlined above, they disagree on other events surrounding the shooting. Windham's description of the events that occurred after he entered the trailer is as follows. Windham testified on deposition that as soon as he turned into the kitchen, he saw Lakina standing by the stove. He ordered her to the ground. When Lakina failed to comply, he placed his left hand on her neck and attempted to force her down. She resisted and remained on her feet.

Because there is no genuine dispute, we will assume for the purposes of this summary judgment motion that the officers did order the occupants of the house to get down.

It is, however, disputed whether the officers identified themselves as they entered through the back door. The officers stated that they did, but Alford's father and thirteen-year-old nephew both claim that they did not. (J.A. at 691, 804.) Construing the record favorably to Alford, the court will assume that the officers did not announce themselves as police officers.

While Windham was trying to force Lakina to the ground, he noticed Alford, who was seven to ten feet away, approaching from the living room. Alford was not running, and he did not appear to be carrying a weapon. Windham began moving in Alford's direction, demanding that he get down. As Windham and Alford converged, Lakina jumped on Windham's back. Although distracted by Lakina, Windham grabbed Alford's right shoulder with his left hand and tried to force Alford to the ground. Alford resisted, remained standing, and jostled Windham's gun. In fear that his gun would be taken and turned against the officers, Windham depressed the trigger, releasing a three-shot burst.

Alford and Lakina's description of the events inside the trailer conflicts with Windham's. Alford testified on deposition that when he heard the flashbang grenade detonate, he stood up and began "running" towards the kitchen to investigate. He encountered his eight-year old niece, Makayla, who was screaming and running through the kitchen. As he reached for Makayla, someone hit him in the upper lip. Until he felt the blow, which "knocked [him] backwards," (J.A. at 440),[5] he did not realize that strangers were in the house. Two seconds later, Alford was struck by bullets. He believes that the officer who shot him was not the officer who hit him

---

[5] It is not clear what Alford meant when he testified that he was "knocked backwards." He stated that he did not remember taking any steps back. (J.A. at 441.)

on the lip. Alford denies touching or attempting to grab Windham's gun. Likewise, Lakina denies jumping on Windham's back.

Alford brought suit on February 28, 2004, asserting (1) a § 1983 claim against Windham for violating his constitutional rights, (2) state law claims against Windham, and (3) § 1983 and state law claims against Butler.[6] The district court found that Windham was entitled to qualified immunity on the § 1983 claim because Windham reasonably perceived that Alford posed a threat. The district court granted summary judgment on the other claims based on the same reasoning. Alford now appeals.

II.

A.

Law enforcement officers accused of using excessive force enjoy qualified immunity when sued under 42 U.S.C. § 1983. Qualified immunity is an entitlement not to stand trial or face other burdens of litigation. *See Schultz v. Braga,* 455 F.3d 470, 476 (4th Cir. 2006). The Supreme Court has "repeatedly . . . stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant,* 502 U.S. 224, 227 (1991) (per curiam).

---

[6] As discussed, Alford brought other claims that are not involved in this appeal because he does not contest their dismissal. *See supra* note 1.

Determining whether qualified immunity applies is a matter of law for the court to decide. *See Schultz,* 455 F.3d at 479. In some cases, the decision is made in connection with a motion to dismiss filed under Federal Rule of Civil Procedure 12(b)(6). Most often, however, qualified immunity is tested at the summary judgment stage after the facts have been developed through discovery.[7]

A court must evaluate the requisites of a qualified immunity defense "in proper sequence." *Saucier v. Katz,* 533 U.S. 194, 200 (2001). The threshold question is whether the facts, viewed in the light most favorable to the plaintiff, demonstrate a constitutional violation. *Id.* at 201. If no constitutional violation occurred, the inquiry ends and the immunity applies. If, however, the facts support a constitutional violation, "the next, sequential step is to ask whether the right was clearly established." *Id.* If not, the defendant is entitled to qualified immunity. If, on the other hand, the right was clearly established, qualified immunity is inapplicable. The case must proceed to trial for resolution of the factual disputes.

---

[7] Qualified immunity can also be applied after trial. "[T]o the extent that a dispute of material fact precludes a conclusive ruling on qualified immunity at the summary judgment stage, the district court should submit factual questions to the jury and reserve for itself the legal question of whether the defendant is entitled to qualified immunity on the facts found by the jury." *Willingham v. Crooke,* 412 F.3d 553, 560 (4th Cir. 2005).

In an excessive force case, an officer is entitled to qualified immunity if he acted reasonably under the circumstances confronting him. *See Rowland v. Perry,* 41 F.3d 167, 173 (4th Cir. 1994).[8] The inquiry is objective in the sense that it disregards the officer's motives. In other words, an officer who uses a reasonable degree of force is protected even if he acts maliciously. Conversely, an officer whose motives are pure is not entitled to qualified immunity if he uses unreasonable force.[9]

When measuring reasonableness, "the use of hindsight must be avoided." *Waterman v. Batton,* 393 F.3d 471, 477 (4th Cir. 2005). A court must place the officer in the context confronting him. "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgements – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Graham v. Connor,* 490 U.S. 386, 396-97 (1989).

---

[8] The qualified immunity test is not always an objective one. For example, a selective enforcement case hinges on the subjective motivations of the state official. *See Butler v. Cooper,* 554 F.2d 645, 646 (4th Cir. 1977).

[9] "Subjective factors involving the officer's motives, intent, or propensities are not relevant." *Rowland v. Perry,* 41 F.3d 167, 172 (4th Cir. 1994). The court looks at the officer's actions "in light of the facts and circumstances confronting [him], without regard to [his] underlying intent or motivation." *Graham v. Connor,* 490 U.S. 386, 388 (1989).

Although the immunity inquiry is objective, it "must be filtered through the lens of the officer's perceptions at the time of the incident in question." *Rowland,* 41 F.3d at 173. This allows the court to focus on what the officer "reasonably perceived." *Id.*

The Supreme Court has stated that determining reasonableness "requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Graham,* 490 U.S. at 396. In an excessive force case, this inquiry requires balancing the degree of force used against the danger posed to the officer and to others. Windham used deadly force. Deadly force is permissible "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." *Tennessee v. Garner,* 471 U.S. 1, 11 (1985).

In applying the qualified immunity test, the district court stated that "[t]he only issue relevant for this court's decision is whether or not defendant Windham's perception of [Alford's] movement as aggressive was reasonable." (J.A. at 149.) In answering this question, the court held that the circumstances facing Windham could have raised a reasonable belief that his "weapon may be taken." *Id.* We review the district court's decision de novo. *See Suarez Corp. Industries v. McGraw,* 202 F.3d 676, 684 (4th Cir. 2000).

B.

On appeal, Alford argues that "an officer is not entitled to qualified immunity in shooting an unarmed man when the facts upon which the officer bases his belief that the suspect posed a threat of harm are contradicted by other evidence in the case." (Appellant's Br. at 16.) As Alford points out, Windham's fear that his gun might be turned against him and his fellow officers was created in large measure by Lakina's alleged attack from behind and Alford's alleged jostling of his gun. Both of these allegations are vigorously disputed.

Alford argues that these discrepancies generate a credibility contest that a jury must decide in order to determine Windham's true motivation for shooting him. This argument misperceives the qualified immunity test. The test is objective, meaning that Windham's subjective motivation is irrelevant. The task that the court must accomplish at the summary judgment stage is to reconstruct the record by resolving all factual disputes in plaintiff's favor. This means, for example, that the court must assume *arguendo* that Lakina did not jump on Windham's back and that Alford did not jostle Windham's gun. The Court must next view the reconstructed record in the light most favorable to the plaintiff.

Having taken these two steps, the Court must then ask whether a reasonable officer in Windham's position could have believed that his gun was threatened. The Court does not inquire whether Windham

himself believed that his gun was threatened. Instead, the focus is on a hypothetical reasonable officer facing the situation (reconstructed in plaintiff's favor) that Windham faced.

We agree with the district court's decision. A reasonable officer in Windham's position would have approached the trailer with the following set of assumptions in mind: (1) as confirmed by the "controlled buy," the Alfords were selling cocaine from their trailer; (2) at least three of the trailer's residents had drug convictions; (3) shots had been fired in the vicinity of the trailer the previous week, and (4) as many as nine people were in the small trailer, presenting a tactical challenge.

As the raid unfolded, a reasonable officer in Windham's position would have observed the following: (1) someone in the trailer actively resisted the officers' attempt to get in through the front door; (2) because of the delay in gaining entry, the officers had lost the element of surprise, making the situation more dangerous; (3) the officers, on entering the house, barked instructions to "get down;" (4) by remaining on his feet, Alford appeared to be ignoring those orders; (5) Alford's arms were outstretched; (6) based on the uncontroverted forensics, Alford's right hand was within inches of the muzzle of Windham's machine pistol, and (7) if turned against the officers, the machine pistol would have been a formidable weapon.

Alford contends that other factors would have caused any reasonable officer to stop before pulling the trigger. Alford points to the following: (1) Alford was unarmed; (2) he was not moving directly towards Windham; (3) he was neither overtly menacing nor even looking at Windham; (4) a reasonable officer would know that the chaos of a raid may render an individual unable to follow a directive to get on the floor; (5) there was a small child in the vicinity whom Alford may have been trying to protect, and (6) either Windham or another officer hit Alford, knocking him away from Windham and stunning him.

The points Alford makes do not undercut Windham's case for qualified immunity. Given sufficient time to reflect, a reasonable officer may well have stayed his hand. The volatile, threatening situation facing Windham, however, did not afford time for reflection. A reasonable police officer could have believed that "[i]f [he] paused for even a instant, [he] risked losing [his] last chance to defend [himself]." *Waterman*, 393 F.3d at 478.

The cases that Alford relies on do not invalidate this analysis. Two of those cases merit discussion.

The first is *Clem v. Corbeau*, 284 F.3d 543 (4th Cir. 2002), in which we affirmed the district court's denial of qualified immunity. In that case, two officers responded to a call placed by Aster Clem about her husband, Robert Clem ("Clem"). She explained that her 58-year-old husband was suffering from dementia and various physical problems, was refusing to take

his medicine, had not eaten for three days, and refused to seek medical attention. Although initially calm, Clem grew agitated, sufficiently so that the officers attempted to subdue him with pepper spray. After being sprayed, Clem began moving towards one of the officers, Shannon Corbeau ("Corbeau"). As described in the opinion, Clem was "'stomping' forward in a 'very odd' manner like a 'robot,' with his hands open and waiving in front of him." Without giving warning, Corbeau shot Clem, who proved to be unarmed.

Corbeau later claimed that the shooting was justified. He explained that Clem had earlier threatened him and patted a pocket as if to suggest he had a weapon. Corbeau also claimed that, on the way to the Clem house, a dispatcher had informed him that Clem had threatened his wife with a knife five weeks earlier.

Although Clem, like Alford, was advancing toward an officer when he was shot, the similarities between the two cases end there. Having spent time with Clem before the shooting, Corbeau knew that Clem, although potentially unpredictable, was a mentally disabled man who was past middle age and appeared feeble. Nothing in the case suggests that Clem was attempting to seize Corbeau's gun or even that Clem was close enough to pose an immediate threat. Unlike Windham, Corbeau had the benefit of a partner who was focused on Clem and capable of providing immediate assistance.

Moreover, Corbeau's reasons for opening fire were based on disputed facts. Both Clem's wife and Corbeau's partner denied that Clem had either threatened the officers or made a gesture suggesting that he was armed. Corbeau himself admitted that he "may have" known that the story about Clem threatening his wife with a knife was false. Absent the disputed facts, a reasonable officer in Corbeau's position would not have believed that Clem posed an immediate threat of serious bodily harm. Accordingly, we held that Corbeau was not entitled to qualified immunity at the summary judgment stage, and a trial was necessary to resolve the disputed facts.

The second case is *Schultz v. Braga,* 455 F.3d 470 (4th Cir. 2006). Here, too, the court held that the defendant, an FBI agent, was not entitled to qualified immunity at the summary judgment stage. In *Schultz,* a team of FBI agents, acting on a tip, staked out a 7-Eleven store. They were looking for a notorious bank robber who, they were told, would be arriving in a red car driven by a redheaded woman. The robber would be wearing a white baseball cap. During the stake-out, a red-headed woman in a red car drove into the parking lot. Her passenger was a man wearing a white baseball cap. Although the agents did not know it at the time, the couple were entirely innocent youngsters who became victims of circumstance. The driver was 16-year-old Kristen Harkum ("Harkum"), and the passenger was her date, 20-year-old Joseph Schultz ("Schultz").

The agents followed the couple as they drove from the parking lot. A few minutes later, they forced the car to the side of the road. Four agents surrounded the car, guns drawn. Agent Stephen Stowe ("Stowe") approached the passenger side and ordered the couple to put their hands in the air. Harkum and Schultz obeyed. Then, in a loud voice, Stowe ordered Schultz to unlock the passenger-side door.

A split second later, Special Agent Christopher Braga ("Braga"), who was standing just a few feet from Stowe, opened fire on Schultz. Braga later claimed that Schultz had turned to the left and reached down, as if to grab something from between the seats. Harkum, Schultz, and Stowe all disagreed, testifying that Schultz had turned to the right to unlock the door, as ordered.

A reasonable officer in Braga's situation would have perceived the situation to be tense. Had Schultz, defying a peremptory command, moved his hands away from the door and towards the console, then a reasonable officer may well have made a split-second decision to shoot. The summary judgment standard, however, required the court to assume that Schultz was complying with the order, that his hands were in view, and that he was moving to unlock the door when Braga shot him. As in *Clem,* despite the tense circumstances, no reasonable officer operating under such assumptions would have used deadly force.

In the instant case, construing the facts in Alford's favor does not remove two salient perceptions

that we must impute to a reasonable officer. First, that the situation was tense and volatile. Second, that Alford's hand was within inches of Windham's gun. We find that a reasonable officer, forced to make a quick decision, could have concluded that Alford posed an immediate threat of serious physical harm. Accordingly, Windham did not violate Alford's constitutional rights, and Windham is entitled to qualified immunity.

III.

We turn next to Alford's state law claims against Windham for (1) assault and battery, (2) negligence, and (3) punitive damages.[10] The district court held that Windham was entitled to public official immunity under North Carolina law and dismissed these claims. Alford appeals this ruling.

As we have discussed, the qualified immunity analysis for excessive force claims under § 1983 examines the objective reasonableness of the officer's actions. We concluded that Windham was entitled to qualified immunity under this standard because a reasonable officer could have believed that Alford posed an immediate threat of physical harm. North Carolina's public official immunity analysis, however, requires an inquiry into the subjective motivations of

---

[10] Alford did not mention his trespass claim against Windham in his opening brief. Accordingly, he has waived appeal of this claim. *See* Fed. R. App. P. 28(a)(9)(A).

the official. *See Andrews v. Crump,* 144 N.C.App. 68, 76-77, 547 S.E.2d 117 (2001).

To qualify for public official immunity under North Carolina law, a police officer must "exercise[] the judgment and discretion with which he is invested . . . , keep[] within the scope of his official duty, and act[] without malice or corruption." *Smith v. State,* 289 N.C. 303, 331, 222 S.E.2d 412, 430 (1976).[11] According to Alford, Windham acted with malice when he shot "an unarmed man in cold blood."

Under North Carolina law, "[a] defendant acts with malice when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty and which he intends to be prejudicial or injurious to another." *Grad v. Kaasa,* 312 N.C. 310, 313, 321 S.E.2d 888, 890-891 (1984). An action is wanton if "it is done with wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others." *Id.*

In dismissing Alford's state law claims, the district court concluded that "Windham acted reasonably in light of the circumstances." The court did not consider, however, whether Windham acted with malice. Although the district court did not apply the proper standard for public official immunity under North Carolina law, we affirm the district court's

---

[11] *See also Prior v. Pruett,* 143 N.C.App. 612, 623-24, 550 S.E.2d 166, 173-74 (2001) (analyzing public official immunity in a police excessive force case).

ruling because Alford failed to create an issue of material fact as to malice.

Alford argues that Windham is not entitled to public official immunity because he "maliciously shot Appellant." (Appellant Br. at 48). Although Alford properly identifies "malice" as an element of the North Carolina test for public official immunity, his assessment offers no facts to support his conclusion.

To support his claim of malice, Alford speculates that, "[i]n all likelihood, Windham was upset at being denied access to the front door and decided to take out his frustrations on the first person he met in the residence." Mere speculation is insufficient to create an issue of material fact. *JKC Holding Co. LLC v. Washington Sports Ventures, Inc.*, 264 F.3d 459, 465 (4th Cir. 2001). Alford failed to produce any evidence that Windham acted for any purpose other than to defend himself. Without such evidence, Alford has not created an issue of material fact as to whether Windham acted maliciously. Accordingly, Windham is entitled to public official immunity under North Carolina law.

IV.

Finally, we turn to Alford's claims against Butler. Because Alford failed to raise these claims on appeal, he has abandoned them.

Under Federal Rule of Appellate Procedure 28(a)(9)(a), the appellant's opening brief must include

"appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which appellant relies." "Failure to comply with the specific dictates of this rule with respect to a particular claim triggers abandonment of that claim on appeal." *Edwards v. City of Goldsboro,* 178 F.3d 231, 241 n.6 (4th Cir. 1999).

Alford does mention his claims against Butler in his opening brief. He does so, however, in a mere two sentences that conclusorily contend that the lower court erred in dismissing those claims.[12] He failed to comply with Federal Rule of Appellate Procedure 28(a)(9)(a). Accordingly, he has waived his claims against Butler.

V.

For the foregoing reasons, we affirm the district court's grant of summary judgment to Windham.

AFFIRMED.

---

[12] Alford's opening brief contains a section titled "Butler Can be Held Responsible for Windham's Actions." Alford's entire argument is as follows: "The district court granted summary judgment to Butler on Appellant's federal claims under 42 U.S.C. § 1983 and state law claims of respondeat superior and supervisory liability based on the court's holding that Windham acted objectively reasonable [sic] as a matter of law in shooting Appellant. Because this holding is erroneous, the federal and state law claims against Butler should be reinstated." (Appellant's Br. at 49.)

GREGORY, Circuit Judge, concurring in part and dissenting in part:

Today the majority affirms the district court's grant of summary judgment on Sergeant Cuyler Larue Windham, Jr.'s (Windham) qualified immunity claim. The majority concludes that Windham had probable cause to believe that Charles Alford (Alford) posed a threat of serious bodily harm or death because of the "volatile, threatening situation" he faced during the drug raid. (Majority Opinion, p. 14.) The majority holds that a reasonable officer in Windham's position could have believed his life would have been in danger had Windham taken the slightest moment to pause for reflection before firing, thereby justifying the use of deadly force. While I concur with the majority's articulation of the law on qualified immunity, I must dissent based upon their application of the facts to that law.

The threshold question in the qualified immunity calculus is whether the facts, viewed in the light most favorable to the plaintiff, demonstrate a constitutional violation. *Saucier v. Katz,* 533 U.S. 194, 201 (2001). More specifically, we must ask "whether a reasonable officer in the same circumstances would have concluded that a threat existed justifying the particular use of force." *Elliot v. Leavitt,* 99 F.3d 640, 642 (4th Cir. 1996). Without question, Windham and Alford have conflicting accounts of the events. However, at the summary judgment stage, the law requires us to construe all facts and "justifiable inferences" in the manner most favorable to Alford.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

Unfortunately, the majority fails at this endeavor, at times resolving certain disputed facts in Windham's favor.[1] The majority also sets out a series of presumptions with which a reasonable police officer in Windham's position would have approached the trailer; yet, the majority considers only those presumptions favoring the officer, ignoring any that favor Alford.[2]

While I take issue with the majority's application of the material facts to the underlying law, they do a fine job of reiterating our primary undertaking at this

---

[1] For example, despite Alford's contention that he did not hear the officers' order to "Get down", the majority assumes that officers' recollection is accurate because the testimony of the officers and Alford's father concur. (Majority Opinion, p. 7, footnote 5.) In discussing what a reasonable officer would have observed as the raid occurred, the majority relies on the forensic report to support its contention that Windham was in serious peril. While the forensic report provides that Alford's forearm was no more than twelve inches from the muzzle of the machine pistol, that fact does not inevitably lead to or necessarily support the conclusion that Alford was acting aggressively. Indeed, there is clearly a material dispute of fact as to why Alford's arms were outstretched in the moment prior to the shooting.

[2] For example, a reasonable officer would have been aware that there were two children in the trailer, and that due to the close quarters of the trailer, extreme chaos was likely to ensue upon the officers' entry into the trailer. Taking these factors into account, a reasonable officer would have exercised an additional measure of prudence (however minute) prior to firing any weapons.

stage: "[t]he task that the court must accomplish at the summary judgment stage is to reconstruct the record by resolving all factual disputes in plaintiff's favor." (Majority Opinion, p. 12.) With this standard in mind, I find these are the salient facts: Alford, an unarmed guest in the trailer, was playing solitaire when the police officers entered. Alford was unaware that anyone had entered the trailer and did not hear the officers shouting "Get down." When Alford heard the sound generated by the grenade explosion, he ran into the kitchen, where he encountered his eight year-old niece Makayla screaming and running. Windham confronted Alford at this point. Alford never looked at or moved directly toward Windham. As Alford reached for his niece, Alford was hit by an unidentified officer, knocking him backward. As a result of the blow, Alford was stunned and knocked away from Windham. It was at this point, as Alford was stunned and falling away from Windham that Windham fired a three shot burst at Alford. At no point did Alford attempt to grab or jostle Windham's gun.

The Fourth Amendment requires that deadly force is only permissible when an officer has probable cause to feel that his physical health is in serious danger. *See, e.g., Elliot v. Leavitt,* 99 F.3d 640, 642 (4th Cir. 1996) ("A police officer may use deadly force when the officer has sound reason to believe that a suspect poses a threat of serious physical harm to the officer or others."). Indeed, the protections of the Fourth Amendment are at their nadir when deadly

force is used. *See, e.g., Clem v. Corbeau,* 284 F.3d 543, 550 (4th Cir. 2002) ("When deadly force is at issue, the Supreme Court has long recognized that the intrusion on Fourth Amendment rights is unmatched."). While the chaotic nature of the overall drug raid provides Windham with some leeway, we must be careful to limit our focus to "the circumstances **at the moment** force was used . . . " *Anderson v. Russell,* 247 F.3d 125, 129 (4th Cir. 2001) (emphasis added).

The lynchpin of the majority's decision is the "uncontroverted" forensic report's conclusion that the muzzle of the pistol was no more than twelve inches from Alford's forearm when the shot was fired. (Majority Opinion, p. 6.) From this conclusion, the majority reasons that because the situation was tense and Alford's hand was within inches of the gun, "a reasonable officer, forced to make a quick decision, could have concluded that Alford posed an immediate threat of serious physical harm." (Majority Opinion, p. 18.)

I respectfully disagree. Based on the undisputed record, Windham saw Alford's arms outstretched. Alford claims (and we must believe) that his arms were outstretched because he was trying to pick up his niece, Makayla. (J.A. 358.) As Alford bent down to pick up Makayla, either Windham or a second officer

hit Alford in the mouth, propelling him backward.[3] (J.A. 358.) Under either scenario, during the split second when Windham made the decision to fire, Windham would have been aware that Alford was hit and falling away from him. Under such a circumstance, the fact that Alford's hand was close to Windham's gun would have been irrelevant because Alford would not have been able to threaten Windham's safety. Indeed, the short distance between Alford's hand and the gun may very well prove a "fact" that is, in the words of Don Quixote, "an enemy of truth." Dale Wasserman, Man of La Mancha 40 (1966).

"The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham v. Connor,* 490 U.S. 386, 396 (1989). Although the severity of the

---

[3] According to Alford, the officer immediately "grabbed" Makayla after striking him. (J.A. 361.) The officer's reaction (striking Alford and immediately thereafter picking up the child) provides further evidence that the officer recognized that Alford was trying to pick up the child, and not attack the officer. If the jury concluded Windham or another officer struck Alford, no reasonable officer in Windham's position would have found Alford's outstretched arms, whether they were falling backward or trying to grab Makayla, threatening.

alleged crime is indisputable, there is a material dispute over whether Alford posed a threat (and if so, how serious) to Windham at any point in their encounter. Finally, it is undisputed that Alford was not attempting to evade arrest by flight.

Overall, assuming Alford's version of what transpired on February 23, 2003, is correct, I cannot conclude, at this stage in the proceedings, that Windham's actions were reasonable under the Fourth Amendment.[4] As the majority points out, qualified immunity can be applied after the trial in situations when, as here, a dispute of material fact precludes a definitive ruling on qualified immunity at the summary judgment stage. (Majority Opinion, p. 9, footnote 7.)

I also disagree with the majority's conclusion in Part III. Even if Windham is not stripped of his qualified immunity, I do not see how this precludes liability under the North Carolina statute. According to North Carolina law, "[a] defendant acts with malice when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty and which he intends to be prejudicial or injurious to another." *Grad v. Kaasa,* 312 N.C. 310, 313, 321 S.E.2d 888, 890 (1984). This is in contrast with

---

[4] Under the factual scenario alleged by Alford, I would also hold that the second prong of the *Saucier* inquiry is satisfied – i.e., it was clearly established that Windham's conduct was unlawful in the circumstances of the case. *Saucier v. Katz,* 533 U.S. 194, 200-201 (2001).

the threshold inquiry in the qualified immunity analysis which requires objectivity and "disregards the officer's motive." (Majority Opinion, p. 10.) The majority's approach, in effect, provides a police officer with *de facto* immunity from all suits so long as he acted reasonably and without any outright indication that his actions were driven by malice. Unless a police officer surprisingly provided direct evidence of animus, he would never be found liable under the majority's interpretation of the North Carolina statute. This is a perverse result that counters any reasonable interpretation and application of the North Carolina statute. As with most claims involving malice, it is rare that the perpetrator expresses animus overtly; his intent must be gleaned through logical inferences and circumstantial evidence.

"To withstand a law enforcement officer's motion for summary judgment on the issue of individual capacity, plaintiffs must allege and forecast evidence demonstrating that the officers acted maliciously, corruptly, or beyond the scope of duty." *Prior v. Pruett,* 143 N.C.App. 612, 623, 550 S.E.3d 166, 174-75 (2001). Alford alleges that Windham shot him despite the fact that he was unarmed, hit in the upper lip, and falling backward. Beyond his allegations, there is little more that Alford can do at this stage in order to bolster his case. In determining whether malice is present, conflicting factual scenarios are commonplace, leaving the jury with a credibility judgment. The two accounts of what transpired prior to the shooting are, charitably speaking, incompatible. If

the jury were to disbelieve Windham's diametrically differing account of the events, and credit Alford's version of what occurred, there is little doubt that the jury could infer malice on the part of Windham.

Thus, I believe that Alford has satisfied his burden at this stage because a reasonable jury could find that Windham's actions were motivated by malice. I would vacate the district court's grant of summary judgment as to the state law claims of negligence, assault and battery, and punitive damages.

As such, I respectfully dissent from Parts I, II, and III of the majority opinion. However, I concur in Part IV of the majority's opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
WESTERN DIVISION

No. 5:04-CV-108-FL(3)

CHARLES ALFORD, Plaintiff, v. CUMBERLAND COUNTY, NORTH CAROLINA; CUMBERLAND COUNTY SHERIFF'S DEPARTMENT; SHERIFF EARL R. BUTLER; and LARUE WINDHAM, JR. individually and in his official capacity, Defendants.	)	ORDER (Filed Mar. 31, 2006)

This matter comes before the court on defendants' motion for summary judgment (DE#25). Plaintiff filed complaint in this action on February 18, 2004, alleging that defendants violated his civil rights under 42 U.S.C. § 1983 and state law during a drug raid in which he was shot by defendant Larue Windham, Jr. (hereinafter "Windham"). Plaintiff has responded, and defendants have replied. In this posture, the issues raised are ripe for ruling. For the reasons that follow, defendants' motion for summary judgment is granted.

I. STATEMENT OF THE CASE

In this action, plaintiff seeks damages for violations of his constitutional and civil rights under 42 U.S.C. §1983, and for state law claims of trespass, assault and battery, negligence and supervisory liability all in connection with the service of a search warrant by the Cumberland County Sheriff's Department, and the Drug Enforcement Administration on 312 Ministry Lane, Fayetteville, North Carolina on February 27, 2003. By Order entered June 29, 2004, upon motion by defendants, this court dismissed all claims against Cumberland County and Cumberland County Sheriff's Department[1], and claims against defendant Windham in his official capacity. Defendants filed the instant motion for summary judgment as to remaining claims on June 6, 2005, to which, as noted, plaintiff responded on July 7, 2005, to which response defendants replied in filing received on July 22, 2005.

II. FACTUAL BACKGROUND

The relevant facts may be summarized as follows. On February 27, 2003, the Cumberland County Sheriff's Department conducted a planned raid on an

---

[1] Although defendants seek summary judgment on Count 6 of the complaint, a claim of *respondeat superior*, such count was alleged only against the Cumberland County Sheriff's Department and by prior Order this court dismissed all claims against such party. Therefore, this court will not now address this portion of defendants' motion.

occupied house in an attempt to seize drugs and other contraband. Several officers, including defendant Windham, entered the house with weapons drawn. Windham and another officer proceeded to the kitchen. Plaintiff was running while others were in an attached living room area[2]. Although plaintiff claims he was not acting aggressively and was not in possession of any weapons, defendant Windham shot plaintiff several times.

Plaintiff alleges violations of his Fourth and Fourteenth Amendment rights against all defendants, and alleges that defendant Sheriff Earl R. Butler (hereinafter "Sheriff Butler") has persistent and widespread policies and practices which led to the deprivation of plaintiff's constitutional rights. Plaintiff also brings state law claims for trespass, assault, battery, negligence and supervisory liability.

III. STANDARD OF REVIEW

Summary judgment is appropriate, under Rule 56(c), "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

---

[2] It is of note that plaintiff's recitation of events has changed from that alleged in his Complaint, in which plaintiff contended that when defendant Windham entered the kitchen, plaintiff was "still standing next to Parker." (Compl. ¶ 23). For purposes of this motion, this court will rely on the recitation of events presented by plaintiff specifically in response to defendants' motion for summary judgment in which plaintiff admits that he was in fact chasing a child through the kitchen when officers entered the residence. (Def. Mem. in Op. p. 8)

affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). A party seeking summary judgment "bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the [record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). The moving party can meet this burden "by showing that there is an absence of evidence to support the nonmoving party's case." *Honor v. Booz-Allen & Hamilton, Inc.,* 383 F.3d 180, 185 (4th Cir. 2004). "[A] complete failure of proof concerning an essential element of [a plaintiff's] case necessarily renders all other facts immaterial." *Celotex,* 477 U.S. at 323. Once the moving party has met its burden, the nonmoving party must then "set forth specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 586-87 (1986) (quoting FED. R. CIV. P. 56(e)).

In making a determination on a summary judgment motion, the court views the evidence in the light most favorable to the non-moving party, according that party the benefit of all reasonable inferences. *Bailey v. Blue Cross & Blue Shield of Virginia,* 67 F.3d 53, 56 (4th Cir. 1995). Nevertheless, judges are not "required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury

in finding a verdict in favor of that party." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 251 (1986) (citations omitted). "[C]onclusory statements, without specific evidentiary support," are insufficient to create a genuine issue of fact. *Causey v. Balog,* 162 F.3d 795, 802 (4th Cir. 1998); *see Thompson v. Potomac Elec. Power Co.,* 312 F.3d 645, 649 (4th Cir. 2002) ("Conclusory or speculative allegations do not suffice"); *Beale v. Hardy,* 769 F.2d 213, 214 (4th Cir. 1985) ("[M]ere speculation or the build ıg of one inference upon another" is not sufficient); *see also Stewart v. Prince George's County,* 75 Fed. Appx. 198, 203 (unpublished) (4th Cir. 2003) ("[T]he non-moving party may not rely on mere conclusory allegations nor speculation, but instead must offer some hard evidence showing that its version of the events is not wholly fanciful.") (quoting *D'Amico v. City of New York,* 132 F.3d 145, 149 (2d Cir.1998)); *Contemporary Mission v. United States Postal Serv.,* 648 F.2d 97, 107 1114 (2d Cir. 1981) ("An opposing party's facts must be material and of a substantial nature, not fanciful, frivolous, gauzy, spurious, irrelevant, gossamer inferences, conjectural, speculative, nor merely suspicions.").

IV. DISCUSSION

A. §1983 Claim - Defendant Windham

Plaintiff asserts a federal claim under 42 U.S.C. § 1983 by alleging that defendant Windham violated his rights under the Fourth and Fourteenth Amendments

to the United States Constitution by using excessive force, namely shooting plaintiff, while executing a search warrant at 312 Ministry Lane. Defendant Windham claims that his use of force was supported by probable cause and as such he argues he is entitled to qualified immunity.

Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs,* 475 U.S. 335, 341 (1986). It protects law enforcement officers from "bad guesses in gray areas" and ensures that they are liable only for transgressing bright lines." *Maciariello v. Sumner,* 973 F.2d 295, 298 (4th Cir. 1992). Determining whether qualified immunity applies generally involves a two-step analysis. First, the court must decide "whether a constitutional right would have been violated on the facts alleged." *Saucier v. Katz,* 533 U.S. 194, 200 (2001). If the court determines that no constitutional right would have been violated on the facts alleged, "that ends the matter and the offic[er] is entitled to immunity." *Id.* If the court determines that a constitutional right would have been violated, the court proceeds to the second step and must determine if "that right was clearly established at the time of the alleged violation." *Wilson v. Flynn,* 429 F.3d 465, 467 (4th Cir. 2005) (citations omitted).

Plaintiff alleges that his Fourth Amendment right to be free from unreasonable seizures was violated, a right which includes seizures accomplished by excessive force. *See Jones v. Buchanan,*

325 F.3d 520, 527 (4th Cir. 2003). In cases of excessive force, the appropriate framework for performing the first step of a qualified immunity analysis is provided by "the Fourth Amendment's objective reasonableness standard." *Graham v. Connor,* 490 U.S. 386, 388 (1989). "As in other Fourth Amendment contexts. . . . the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officer['s] actions are 'objectively reasonable' in light of the facts and circumstances confronting [him] without regard to [his] underlying intent or motivation." *Id.* at 397. "This standard mandates 'a careful balancing' of Fourth Amendment rights 'against the countervailing governmental interests at stake.'" *Wilson,* 429 F.3d at 467 (quoting *Graham,* 490 U.S. at 388).

Because this test requires this court to determine the reasonableness of an officer's actions, it is "not capable of precise definition or mechanical application." *Bell v. Wolfish,* 441 U.S. 520, 559 (1979). Rather, the test "requires careful attention to the facts and circumstances of each particular case." *Graham,* 490 U.S. at 396. Recognizing that "police officers are often forced to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving" we take care to consider the facts from the perspective of a reasonable officer on the scene, and avoid judging the officer's conduct with the "20/20 vision of hindsight." *Id.* at 396.

This court must determine "whether the totality of the circumstances justifie[s]" the use of deadly force given all the circumstances of the case before it.

Tennessee v. Garner, 471 U.S. 1, 8-9 (1985); *see also Rowland v. Perry,* 41 F.3d 167, 173 (4th Cir. 1994) (requiring an evaluation of the proportionality of the force in view of the circumstances). Deadly force is justified only where a reasonable officer would have "sound reason to believe that a suspect poses a threat of serious physical harm to the officer or others." *Elliott v. Leavitt,* 99 F.3d 640, 642 (4th Cir. 1996). The Constitution does not permit "the use of deadly force" against a person who "poses no immediate threat to the officer and no threat to others." *Garner,* 471 U.S. at 11.

With these principles in mind, the court turns to an examination of whether, on the basis of the circumstances presented, defendant Windham's shooting of plaintiff constituted an unreasonable seizure under the Fourth Amendment. The threat the officer perceives at the time is what must be analyzed, not what a criminal jury may find later to be proved or not proved beyond a reasonable doubt. *See Greenidge v. Ruffin,* 927 F.2d 789 (4th Cir. 1991).

Defendant Windham asserts, and plaintiff admits, that he was moving throughout the residence when the officers entered, despite their continual directives to "get down." (Def. Mem. p. 7). Although plaintiff maintains that he was moving toward a child in the residence to protect her from the police officers, plaintiff admits that he in fact approached defendant

Windham to such a degree as to be struck in the mouth by the defendant[3]. (Pl. Mem. in Op. p. 8).

When plaintiff rapidly approached defendant Windham while leaning forward with arms outstretched, defendant Windham was forced to immediately decide whether plaintiff was attempting to assault him. Although plaintiff maintains that he was moving throughout the residence merely to protect a young child, and that once being struck he was merely falling rather than attempting to take defendant Windham's weapon, the reality of the events that transpired is that defendant Windham had very little time to ponder any conflicting factors. As noted by plaintiff, once struck in the face, plaintiff was shot "two seconds later." (Pl. Mem. in Opp. p. 8).

In making a determination as to the reasonableness of defendant's actions in light of the circumstances presented, this court finds the Fourth Circuit's decision in *Waterman* persuasive[4]. *Waterman*

---

[3] Plaintiff could not identify the officer that hit him in the mouth, although defendant Windham admits that he, in fact, was the officer that struck plaintiff.

[4] Plaintiff relies on the Fourth Circuit's holding in *Clem v. Corbeau*, to support his contention that a "difference in testimony effects the shooter's justification for his use of deadly force" and therefore a jury must decide the issue of a violation of constitutional rights. (Pl. Mem. in Opp. p. 15). However, the facts of *Clem* are clearly distinguishable from the facts of this case. In *Clem* the facts of the encounter between the suspect and the officer occurred over a long period of time and the factual

(Continued on following page)

v. Batton, 393 F.3d 471 (4th Cir. 2004). In *Waterman,* officers fired upon a suspect who lurched his vehicle in the direction of the officers. *Id.* When the suspect began to accelerate, none of the officers were directly in front of the vehicle, but all the officers were within 16 to 72 feet of the vehicle and once the vehicle lurched toward the officers, they fired upon it. *Id.* The suspect's estate initiated suit against the officers alleging excessive force. The Fourth Circuit determined that summary judgment in favor of defendants was proper, in that the officers' use of deadly force, under the circumstances, was entitled to the protections of qualified immunity.[5] *Id.* The court found the officer's perception of aggressiveness reasonable and further noted "if the officers paused for even an instant, they risked losing their last chance to defend themselves." *Id.* at 478.

The *Waterman* court held that prior to firing upon the suspect, the officers would have considered several factors, including the suspect leading police on a chase, the suspect's failure to stop for officers,

---

dispute in that case centered around whether or not the suspect ever approached the officer. 284 F.3d 543 (4th Cir. 2002).

[5] The *Waterman* court held that the shots fired as the suspect's vehicle approached the officers were reasonable and entitled to the protections of qualified immunity. However, shots fired after the vehicle passed by the officers, and thus fired when the threat of harm had subsided, were not deemed appropriate for summary judgment, as the court determined that a reasonable factfinder could determine that such use of force was unreasonable.

the suspect's acceleration in the general direct of officers, and earlier reports that the suspect attempted to run another officer off the road. *Id.* at 478-479. Similarly in this case, defendant Windham would have considered several factors prior to his use of force against plaintiff including the fact that the search warrant was being served in a residence where drug buys were known to have taken place, the resistance first met by officers when they attempted to enter the residence through the front door, information reported to officers that shots had been fired in the residence on a previous occasion, and plaintiff's continued approach toward defendant Windham despite the repeated directive by officers to "get down." (Def. Mem. p. 7). Additionally, defendant Windham, after striking plaintiff in the face, felt jostling of his weapon, which he attributed to plaintiff's attempts to gain control of the gun, a semiautomatic suppressor-fitted machine pistol. (Def. Mem. p. 7).

In the instant cases plaintiff admits that he was moving in the direction of officers rather than obeying the verbal commands to "get down." There is no factual dispute here as to whether or not plaintiff approached defendant Windham. The only issue relevant for this court's decision is whether or not defendant Windham's perception of such movement as aggressive was reasonable. Applying the holding in *Waterman* to this case, this court, upon review of the totality of the circumstances known to and perceived by defendant Windham, concludes as a matter of law

that defendant Windham had probable cause to believe that plaintiff posed an immediate threat of serious physical harm to defendant Windham.

Like the officers in *Waterman,* defendant Windham was faced with a split-second decision, where an individual refused to comply with the officer's commands and approached defendant Windham in what could reasonably be determined to be an aggressive manner such that physical contact was made, and defendant Windham feared that his weapon may be taken. The Fourth Circuit has held if an officer could have found probable cause to believe that a suspect presented a serious threat of personal harm at the time he pulled the trigger, then as a matter of law, that officer is entitled to qualified immunity. *Slattery v. Rizzo,* 939 F.3d 213 (4th Cir. 1991). Accordingly, this court finds that plaintiff's civil rights were not violated when he was shot by defendant Windham as defendant Windham acted reasonably in light of the circumstances and thus is entitled to qualified immunity. Defendant Windham's motion for summary judgment on plaintiff's § 1983 claim is granted.

B. § 1983 Claim - Defendant Sheriff Butler

Plaintiff asserts a § 1983 claim against defendant Sheriff Butler alleging both a widespread practice of allowing officers to use unreasonable and deadly force without justification and a failure to properly train. Plaintiff claims that such actions caused the deprivation of his civil rights. (Compl. ¶¶ 39, 41). As noted

above, this court has determined that plaintiff's civil rights were not violated, and, therefore, plaintiff's claims against defendant Sheriff Butler for the same alleged violations must fail. *See Shaw v. Stroud,* 13 F.3d 791, 799 (requiring a plaintiff to show a causal link between the supervisor's inaction and plaintiff's asserted constitutional injury). Therefore, defendant Sheriff Butler's motion for summary judgment on plaintiff's § 1983 claim also is granted.

C. Trespass

Plaintiff asserts a state law claim of trespass against defendant Windham. (Compl. ¶ 46). To sustain a claim of trespass under the common law of North Carolina, a plaintiff must show: (1) that he was in possession of land at the time of the alleged trespass; (2) that the defendant made an unauthorized, and therefore unlawful entry onto the land and (3) that plaintiff was damaged by the alleged invasion of his rights. *Jordan v. Foust Oil Co.,* 116 N.C. App. 155, 166 (1994).

In this case, defendant Windham, along with other officers, entered the residence at 312 Ministry Lane pursuant to a valid search warrant issued following surveillance of the residence and several controlled drug buys being conducted within the residence. Plaintiff has failed to challenge the sufficiency or validity of the search warrant, and therefore, plaintiff fails to assert that defendant Windham was unlawfully in the residence. As plaintiff has

failed to meet the elements of a claim of trespass as outlined by the North Carolina Court of Appeals, this court finds such claim to be without merit and summary judgment on this claim is hereby granted in favor of defendant Windham.

D. Assault and Battery

Plaintiff also asserts a claim against defendant Windham for assault and battery, alleging that defendant Windham acted maliciously and intentionally when he shot plaintiff. (Compl. ¶ 46). Under North Carolina law, public officials engaged in discretionary, governmental duties enjoy absolute immunity from personal liability so long as they keep within the scope of their official duty and act without malice or corruption. *Grad v. Kaaza*, 312 N.C. 310 (1984). However, public officials who violate clearly established rights by acting with malice are not entitled to such immunity. *Id.*

As noted above, this court has determined that defendant Windham acted reasonably and thus did not violate the constitution rights of plaintiff. Therefore, in accordance with North Carolina law, defendant Windham is entitled to public official immunity and plaintiff's claim of assault and battery must fail. Defendant Windham's motion for summary judgment on plaintiff's state law claim of assault and battery also is granted.

E. Negligence

Plaintiff next asserts a state law claim alleging that defendants were negligent in their authorization of the "raid" at Ministry Lane and that defendant Windham was negligent in shooting plaintiff. (Compl. ¶¶ 49-50). Under North Carolina law, negligence claims against law enforcement officers may stand only if there is evidence of malicious conduct by the officers. *Smith v. State*, 289 N.C. 303 (1976).

In this case, plaintiff has presented no evidence of malicious conduct by any of the defendants. First, the search warrant was obtained from a federal court and issuance was granted only after significant surveillance and numerous drug buys had taken place, including one on the date the search warrant was issued. Therefore, this court finds that the service of the search warrant on 312 Ministry Lane was not done with malice, and therefore plaintiff's claim must fail.

Additionally, as noted above, defendant Windham acted reasonably when he shot plaintiff and no findings have been made by this court that he acted maliciously. Therefore, in accordance with North Carolina law, plaintiff's claim for negligence must fail and defendant's motion for summary judgment is granted.

F. Supervisory Liability

Plaintiff also presents a state law claim of supervisory liability against defendant Sheriff Butler, alleging that his failure to adequately supervise defendant Windham resulted in the malicious injury to plaintiff. In North Carolina, to sustain a claim under supervisory liability, the plaintiff must prove: (1) the specific negligent act on which the action is founded, (2) the incompetency, by inherent unfitness or previous acts of negligence, from which the incompetency may be inferred, (3) either constructive or actual notice to the master . . . and (9) that the injury complained of resulted from the incompetency proved. *Medlin v. Bass*, 327 N.C. 587 (1991). Plaintiff's claim in this case for supervisory liability fails. As has been found by this court, defendant Windham acted reasonably when he shot plaintiff and therefore no negligence may be found as no malice has been proven. As plaintiff has failed to prove the elements of this claim, defendants' motion for summary judgment on this claim is granted.

G. Punitive Damages

Plaintiff seeks an award of punitive damages as he alleges that defendants maliciously and intentionally injured him. Because the court has granted summary judgment in favor of defendants with respect to each of plaintiff's claims, there is no cause of action remaining upon which an award of punitive

damages could be granted. As such, plaintiff's request for punitive damages is moot and hereby dismissed.

V. CONCLUSION

For the reasons stated above, defendants' motion for summary judgment (DE #25) is GRANTED. All remaining claims raised by plaintiff are DISMISSED. The clerk is directed to close this case.

SO ORDERED, this 31st day of March, 2006.

/s/ Louise W. Flanagan
LOUISE W. FLANAGAN
Chief United States
District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
November 8, 2007

No. 06-1569
5:04-cv-00108-FL

CHARLES ALFORD,

Plaintiff-Appellant

v.

CUMBERLAND COUNTY, NORTH CAROLINA; CUMBERLAND COUNTY SHERIFF'S DEPARTMENT; EARL L. BUTLER, Sheriff; CUYLE LARUE WINDHAM, JR., Individually and in his official capacity as an Officer of the Cumberland County Sheriff's Department

Defendants-Appellees

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Chief Judge Williams, Judge Gregory, and Judge Legg.

For the Court,

/s/ Patricia S. Connor
CLERK

90

No. 07-1012

FILED

APR 21 2008

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The Supreme Court of the United States

CHARLES ALFORD,

Petitioner,

v.

CUYLER LARUE WINDHAM, JR., ET AL.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

Ronnie M. Mitchell
NC State Bar No. 8423
MITCHELL BREWER RICHARDSON
225 Ray Avenue
Fayetteville, NC 28304
(910) 678-7100
Attorneys for Earl R. Butler

Reginald B. Gillespie, Jr.
NC State Bar No. 10895
FAISON & GILLESPIE
Post Office Box 51729
Durham, North Carolina 27717
(919) 489-9001
Attorneys for Larue Windham, Jr.

Harvey Raynor
NC State Bar No. 10009
OFFICE OF THE COUNTY ATTORNEY
CUMBERLAND COUNTY
Post Office Drawer 1829
Fayetteville, North Carolina 28302
(910) 678-7762
Attorneys for Respondents (Officially)

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

TABLE OF CONTENTS

QUESTION vi

PARTIES TO THE PROCEEDINGS vii

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STATEMENT OF THE CASE 3

THE COURT SHOULD DENY THE PETITION AND DECLINE TO REVIEW THE FOURTH CIRCUIT'S DECISION BELOW 17

CONCLUSION 39

TABLE OF CITED AUTHORITIES

FEDERAL CASES

Alexander v. City and County of San Francisco, 29 F.3d 1355 (9th Cir. 1994), *cert. denied*, 513 U.S. 1083 (1995) 28,32, 33, 34, 35, 36, 37

Alford v. Cumberland County, No. 06-1569 (October 15, 2007).. 2

Billington v. Smith, 292 F.3d 1177 (9th Cir. 2002) 34, 35

Carr v. Tatangelo, 338 F.3d 1259 (11th Cir. 2003).. . . . . 28, 38

Drewitt v. Pratt, 999 F.2d 774 (4th Cir. 1993) . . . 35

Eason v. Anoka-Hennepin E. Metropolitan Narcotics & Violent Crimes Task Force,
2002 U.S.Dist. LEXIS 10645
(D. Minn. 2002) 37

Gahn v. Fujino, 1994 U.S. App. LEXIS 30018
(9th Cir. 1994) 36

Graham v. Connor, 490 U.S. 386,
109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)
. . . . . 1, 2, 16, 17,
21, 22, 23, 24, 25, 26, 27, 29, 35, 37,
38, 39

L.A. County v. Rettele, 550 U.S. ___, 127 S. Ct. 1989,
167 L. Ed. 2d 974 (2007) 18

Logan v. City of Pullman, 392 F. Supp. 2d 1246 (E.D. Wash. 2005).. 37

Malley v. Briggs, 475 U.S. 335, 106 S. Ct. 1092, 89 L. Ed. 2d 2771 (1986). 29

Michigan v. Summers, 452 U.S. 692, 101 S. Ct. 2587, 69 L. Ed. 2d 340 (1981). . . 18

Milstead v. Kilber, 243 F.3d 157 (4th Cir. 2001) .. 26

Murray-Ruhl v. Passinault, 246 Fed. Appx. 338 (6th Cir. 2007).. . . . . 28, 29, 30, 31, 32

Rowland v. Perry, 41 F.3d 167 (4th Cir. 1994) 22, 23, 25

Schultz v. Braga, 455 F.3d 470 (4th Cir. 2006). . . 23

Scott v. Harris, 550 U.S. ___, 127 S. Ct. 1769,
167 L. Ed. 2d 686 (2007). 16, 20, 36

Trahan v. City of Oakland, 960 F.2d 152,
1992 U.S. App. LEXIS 8566 (9th Cir. 1992)
. . . . . 28, 32, 37,38

United States v. Clyburn, 24 F.3d 613 (4th Cir.),
cert. denied, 513 U.S. 907, 115 S. Ct. 274,
130 L. Ed. 2d 192 (1994). 3, 32

Vlasak v. Las Vegas Metro. Police Dep't,
213 Fed. Appx. 512, 514 (9th Cir. 2006). . . 36

Waterman v. Batton, 393 F.3d 471 (4th Cir. 2005). 28

QUESTION PRESENTED

Did the Fourth Circuit correctly hold that, given the tense, uncertain, and rapidly evolving situation confronting Respondent Cuyler LaRue Windham, Jr. ("Captain Windham"), and under the threatening and volatile circumstances he faced, could a reasonable law enforcement officer have believed that Petitioner posed an immediate threat of serious physical harm?

PARTIES TO THE PROCEEDINGS

Petitioner is Charles Alford.

Respondents are Cuyler Larue Windham, Jr. and Sheriff Earl L. Butler

INTRODUCTION

The Fourth Circuit correctly applied *Graham v. Connor,* 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed 2d 443 (1989), to the tense, uncertain, rapidly, evolving, threatening and volatile situation that faced the Cumberland County Sheriff's Office ("CCSO'S") Special Response Team ("SRT").

After fierce resistance and being denied entry, despite a valid search warrant, through the front door of the mobile home where Petitioner was present with his drug-dealing relatives, the SRT forced entry through the rear door. During the course of entry Captain Windham shot Petitioner, who was within arm's reach and was non-compliant with shouted instructions to get down. Petitioner disputed Captain Windham's contention that he shot Petitioner out of a fear that his gun might be turned against him, when Petitioner's niece, Lakina Alford ("Lakina"), jumped on Captain Windham's back and he felt his H&K semiautomatic machine pistol being jostled. As the Fourth Circuit decision noted,

> [Petitioner] argues that these discrepancies generate a credibility contest that a jury must decide in order to determine Windham's true motivation for shooting him. This argument misperceives the qualified immunity test. The test is objective, meaning that Windham's subjective motivation is irrelevant. The task that the court must accomplish at the summary judgment

> stage is to reconstruct the record resolving all disputes in [Petitioner's] favor . . . [T]he Court must then ask whether a reasonable officer in Windham's position could have believed that his gun was threatened. The Court does not inquire whether Windham himself believed that his gun was threatened. Instead, the focus is on a hypothetical reasonable officer facing the situation (reconstructed in [Petitioner's] favor) that Windham faced.

Alford v. Cumberland County, No. 06-1569 (October 15, 2007), slip op. at 12-13.

This case is a perfectly unexceptional application of this Court's decision in *Graham*. The Fourth Circuit focused on uncontested facts or facts admitted by Petitioner in holding that

> given sufficient time to reflect, a reasonable officer may well have stayed his hand. The volatile, threatening situation facing Windham, however, did not afford time for reflection. A reasonable police officer could have believed that if he paused for even an instant, he risked losing his last chance to defend himself. . . .
>
> . . . .

> [A] reasonable officer, forced to make a quick decision, could have concluded that [Petitioner] posed an immediate threat of serious physical harm. (citations omitted).

Slip op. at 14, 18.

STATEMENT OF THE CASE

In early 2003, after months of observation, surveillance, and accumulation of evidence of extensive illegal narcotics transactions at 312 Ministry Lane, a mobile home and residence in rural Cumberland County, North Carolina, a federal/state/local law enforcement drug task force identified Petitioner's nephew, Garry Alford ("Garry"), as a major trafficker of cocaine and crack cocaine, together with other conspirators, including Garry's mother and sister. Participants in the task force included the United States Drug Enforcement Administration ("DEA"), the North Carolina State Bureau of Investigation ("SBI"), and the CCSO. S.A. 1.

Following this surveillance and a series of controlled buys[1] of drugs from Garry by a confidential

---

1 The Fourth Circuit's description/definition of a controlled buy can be found in *United States v. Clyburn*, 24

informant, DEA Special Agent John Wilson directed that a federal search warrant be obtained and served at 312 Ministry Lane and at Garry's residence on Dominion Drive. Janet Alford ("Janet"), who is Garry's mother and Petitioner's sister, and Lakina, lived at 312 Ministry Lane. S.A. 2-3.

The investigation determined that Garry conducted much of his drug trafficking business from this Ministry Drive location. Garry also maintained a residence at Dominion Drive, where he lived with his girlfriend, Tanisha Whitted, and her two children, Makayla and Xavier. S.A. 4, 6. However, after an armed robbery at Dominion Drive in January 2003, Garry, Tanisha, Makayla, and Xavier stayed mostly at Ministry Lane. S.A. 5.

The DEA set the date for the drug raid as February 27, 2003, and required the assistance of the SRT to serve the federal search warrant at Ministry Lane and Dominion Drive and secure the occupants. The drug raid occurred at about 8:00 p.m. on February 27, 2003, following a final controlled buy of crack cocaine by the confidential informant at Ministry Lane. S.A. 8, 1482. Prior to the raid, the SRT conducted close surveillance and monitoring of the

---

F.3d 613, 617 (4th Cir.), *cert. denied*, 513 U.S. 907, 115 S. Ct. 274, 130 L. Ed. 2d 192 (1994).

site, reviewed criminal incident reports for the site and the subjects, ran criminal history checks, prepared operations plans, participated in an overall briefing in which all members of the task force joined, and then held a tactical briefing of the SRT itself. S.A. 9-82.

At the direction of DEA Special Agent John Wilson, CCSO Captain Smith prepared an operations plan for Agent Wilson's approval. S.A. 83. Background intelligence revealed that a number of the subjects had prior felony convictions for drug trafficking and other crimes, a confidential informant had provided information about a series of controlled buys of quantities of cocaine, and neighbors (including a CCSO deputy) had complained of criminal and "drug house" activity at 312 Ministry Lane. In addition, the CCSO's database included a report of a weapon discharged at the Ministry Lane mobile home in the recent past. S.A. 84-86. The officers were also aware from the confidential informant that children might be present. S.A. 87.

The SRT prepared its own tactical operation plan. S.A. 87. That plan was thoroughly reviewed, and it formed the basis for the briefing conducted prior to the raid. Among the criminal history intelligence that the task force had was that Garry had previously been convicted of state felony drug trafficking charges

and had served prison time. S.A. 88-89. Janet had also previously been convicted of state felony drug trafficking charges. S.A. 90-93. Lakina also had previously been convicted of state felony drug charges. S.A. 94-95. Task force members were also aware that Petitioner's father, Willie Alford, Sr., was another frequent visitor who had a criminal history of misdemeanor assault as well as assault on a female. S.A. 96-97.

Captain Windham was the SRT supervisor, but at the time of the raid, the officer in command at Ministry Lane was then-Sergeant (now Lieutenant) Charles Parker. S.A. 98. Because of the limited size of the SRT and the dual, simultaneous raids at Ministry Lane and Dominion Drive, Captain Windham was included on the Ministry Lane team to provide necessary manpower. S.A. 59.

At the time of the raid, Captain Windham had 17 years experience with the CCSO. S.A. 100. He had been on the SRT since its inception in 1995, although he had worked with the predecessor special operations unit under the prior sheriff and had supervised the SRT since 2001. S.A. 101. Captain Windham had received extensive training on the SRT from the FBI as well as from the North Carolina Justice Academy. He was also a graduate of the FBI National Academy.

Similarly, all members of the SRT had received extensive and regular training. S.A. 253-1448.

Captain Windham had never been the subject of any complaints of excessive force while engaged in SRT duties. No meritorious or sustainable excessive force complaints against SRT members have ever been asserted.

Petitioner and his wife, Bobby, lived outside of Atlanta, Georgia. S.A. 103. At the time of the drug raid, Petitioner was essentially an unemployed owner/operator long-distance truck driver. Petitioner stayed in Cumberland County without work most of January and February 2003. S.A. 104-05. Bobby joined Petitioner in Cumberland County in mid-February at the time of the funeral of an aunt of Petitioner, and was at Dominion Drive at the time of the drug raid. S.A. 106. Although Petitioner and Bobby based themselves at Dominion Drive during this period, either or both frequented the Ministry Lane residence, spending days and evenings at Ministry Lane visiting with family members. S.A. 107-08.

Petitioner had not obtained any work in January or February 2003. He was having difficulty paying his bills. S.A. 109-14. He was paying on two tractor trucks. Petitioner routinely fell behind on his

truck or house payments. S.A. 115-16. In early 2003 Garry loaned Petitioner $6,000, presumably to tide Petitioner over until he received other income. Petitioner was aware that Garry had been convicted and served prison time for dealing drugs and that Garry had no visible means of support. S.A. 117-18.

The confidential informant verified that on several occasions when she went to Ministry Lane to buy drugs, Petitioner was present and she talked with him. S.A. 1482. Indeed, just before the raid, Petitioner sat at a computer eight feet away from the informant while she finalized the purchase of 2 ounces of crack cocaine from Garry. Garry was "cooking" the crack on the stove just a few feet across the counter top that separated the kitchen from where Petitioner sat at the computer. S.A. 1482. Petitioner claims he was unaware that Garry was selling crack to the confidential informant a few feet away.

At the time the drug raid began, nine people were in the mobile home at Ministry Lane.[2] S.A. 119-31. Garry was found in Janet's bedroom at the end of the mobile home closest to Ministry Lane. S.A. 132. Lakina was in the kitchen area. S.A. 133. Willie

---

2 A schematic diagram of the mobile home prepared by a registered engineer appears at S.A. 157.

Alford Sr. was in the vicinity of the living room. S.A. 135. Makayla and Xavier were seated on a sofa against the back wall of the living room. S.A. 134. An elderly, feeble uncle of Petitioner, Johnny Alford, was in the first bedroom on the hall leading from the front door away from the direction of Ministry Lane. S.A. 136. Tanisha Whitted and a visitor were in the bedroom at the end of the mobile home farthest from Ministry Lane. S.A. 137. Petitioner states he was playing solitaire (S.A. 138-39) on the computer located approximately eight feet from the front door (S.A. 140) and adjacent to the partial counter that separated the living room from the kitchen. S.A. 141-42.

The SRT approached the end of the mobile home furthest away from Ministry Lane. S.A. 143-47, 148-50. Team members testified that as they approached along the front of the mobile home several of them banged loudly on the mobile home and announced, "Sheriff's Office, search warrant." Occupants of the mobile home heard a loud banging but none acknowledge hearing "Sheriff's Office, search warrant." S.A. 158, 159-60. Petitioner denies hearing any banging.

At the front door, Deputy Leggette, a 260 to 280 pound former Fayetteville State University football player, slammed a metal battering ram into the door

several times. S.A. 161-64. Several SRT members saw the door open six to eight inches and then slam closed about three times. S.A. 161-64. One member recalls seeing the face of a black male briefly through the partially-opened door. S.A. 165. Petitioner, sitting about eight feet from this door, states he does not remember either hearing the battering ram or seeing the partial breach of the door. S.A. 172.

Having been blocked from entering through the front door, the SRT leader called "alternate breach". S.A. 150, 169. The SRT members reversed course, ran around the end of the mobile home (S.A. 143), and began to re-assemble on the back porch to enter through the rear door. S.A. 175.

As SRT members were coming to the back porch, Sgt. Parker kicked in the back door. S.A. 176. Deputy Meade rolled a distraction device, commonly called a "flash-bang," into the mobile home. S.A. 177-78, 179. Unknown to the officers, the back door opened into a laundry vestibule with a washing machine and dryer located immediately inside and to the right. Another door opened into the kitchen from the laundry vestibule. The distraction device deployed at the second door, discharging more of its effect in the laundry vestibule than in the kitchen. S.A. 179-80, 183.

Sgt. Parker then entered, proceeding through the laundry vestibule, shouting repeatedly for persons to get down on the floor. Sgt. Parker turned left into the kitchen, and continued towards the living room. In the kitchen/living room area, he encountered a thin older black male standing and non-compliant. Sgt. Parker attempted to force the man down to the floor; with Sgt. Parker's momentum, he testified that they went down on the living room floor near the hallway leading to the two bedrooms at the farthest end of the mobile home from Ministry Lane. S.A. 181-82.

Following Sgt. Parker, Deputy Meade entered, shouting repeatedly for persons to get down on the floor. Deputy Meade went through the laundry vestibule into the kitchen, and then turned right into Janet's bedroom. There he encountered and secured Garry. S.A. 183-85.

Captain Windham followed Deputy Meade through the vestibule, into the kitchen and turned left. Like the other officers he shouted repeatedly, and loudly enough so that even the next door neighbors heard them, for everyone to get down on the floor. S.A. 186, Appx. to Mot. for Summ. Judgment at 4807.

Each of the officers carried a Hock & Kessler MP5 semiautomatic suppressor-fitted machine pistol.

Captain Windham held his weapon in his right hand with a shoulder strap over his right shoulder. S.A. 187-88. Heading into the kitchen, Captain Windham saw a large black female (Lakina), who refused to comply with the directive to "Get down!", and who stood in the kitchen generally in front of the sink. Captain Windham proceeded to her and went "hands on," seeking to put her to the floor to secure her. S.A. 186-93.

As Captain Windham attempted to put this large female (Lakina) on the floor, his attention was drawn toward the direction of the living room by a large black male. The large black male approaching Captain Windham was Petitioner, and, *according to Petitioner himself,* and as confirmed by forensic examination, was leaning forward and with arms outstretched S.A. 214, 252N, 252Q, 252S-252W. Captain Windham turned, stepped toward Petitioner, and attempted to put a hand on Petitioner's head to try to force him down to the floor. Petitioner did not go down. As Petitioner moved towards Captain Windham from the front and with Lakina either behind or to the side of Captain Windham, he felt jostling and tussling of his gun and right forearm, which he perceived to be an effort to grab his gun. Fearing that his gun was about to be taken from him, and knowing that many officers are shot with their own weapons, Captain

Windham depressed the trigger once and shot a three round burst. Petitioner went down backwards, shot. S.A. 193, 203-10.

According to uncontested evidence from crime scene reconstruction expert Ross Gardner, Captain Windham's first shot hit Petitioner in the arm and chest, traveling from Petitioner's right to his left at an oblique angle to his body while the weapon was in close proximity. S.A. 213. Petitioner was bent slightly at the waist or chest towards the muzzle. S.A. 214. The uncontested forensic evidence further shows the following:

- *At the time Petitioner sustained the arm and left chest wound, his right hand was either touching or in very close proximity to the muzzle of Captain Windham's weapon.* S.A. 213, 252FF-252LL, 252NN-252RR, 252UU.

- Petitioner's body was turned with his right side facing the weapon. S.A. 215

- The second bullet was shot in an almost level trajectory, but slightly downward, from a height of about 34 inches from the floor level, establishing that Captain Windham was in a "crouched" position with knees substantially

bent when the first bullet was fired. S.A. 211-16. The trajectory is consistent with Captain Windham having a heavy female such as Lakina, who weighs over 200 pounds, on his back when he fired.

- The third bullet was shot from a muzzle position 14 inches different from that of the first shot, indicating that the muzzle underwent a considerable lateral motion between the discharge of bullets two and three. *A fortiori*, Captain Windham himself was in a similar transition, moving left to right and rising abruptly, as if he had shucked off a heavy weight from his back. S.A. 211-16.

When the suspects were finally brought under control, DEA officers conducted their search pursuant to the federal search warrant. They found residue from crack cocaine manufacturing in the same kitchen area where the informant advised officers that Garry had cooked crack cocaine just before the raid began – the same kitchen area where Captain Windham first encountered Lakina and then Petitioner. S.A. 217. DEA officers also seized, as contraband, more than $10,000 in drug money, and a significant quantity of

marijuana.[3]

The CCSO is a nationally-certified law enforcement agency, and one of only two sheriff's offices in North Carolina certified by the Commission on the Accreditation of Law Enforcement Agencies. Respondent Earl Butler, Sheriff of Cumberland County ("Sheriff Butler"), had promulgated within the CCSO comprehensive use of force and professional standards (internal affairs) policies. S.A. 218-25. After Petitioner was shot, the CCSO's Professional Standards Division conducted a comprehensive investigation. S.A. 226. The SBI also conducted an independent but parallel investigation. The Cumberland County District Attorney requested that the District Attorney of adjoining Hoke County review the SBI's investigation report. Both the SBI and the Hoke County District Attorney determined that Captain Windham's use of force was reasonable and justified, and that he violated no criminal laws when he shot Petitioner. S.A. 1483. The CCSO's Professional Standards Division also found no violation of criminal law or CCSO policies or procedures.

As a result of the task force investigation and

---

3 *See* Appx. to Mot. for Summ. Judgment at 4805.

search, Garry, Janet, and Lakina were charged with and pled guilty to federal drug trafficking offenses. S.A. 227-35, 236-43, 244-52. They are all incarcerated in federal prisons and will continue to be confined for many years.

SUMMARY OF ARGUMENT

Petitioner asks this Court to abandon the "objective reasonableness" analysis of Fourth Amendment excessive force claims mandated by *Graham,* by injecting an officer's subjective beliefs into a court's review. There is no compelling reason to do so and unsettle decades of consistent and effective precedent using the "objective reasonableness" test. Such a substantial and abrupt sea-change in Fourth Amendment excessive force jurisprudence would have major and undesirable consequences. Given that, at the summary judgment stage a court's review of the reasonableness of force "is a pure question of law," *Scott v. Harris*, 550 U.S. ___ , n.8, 127 S. Ct. 1769, 1776, n.8, 167 L. Ed. 2d 686 (2007), considering an officer's subjective beliefs would thrust judges into a quagmire of mind-reading, psychology, divination, and second-guessing. That, in turn, would be a poor and ultimately frustrating use of judicial resources.

THE COURT SHOULD DENY THE PETITION AND DECLINE TO REVIEW THE FOURTH CIRCUIT'S DECISION BELOW

There is No Compelling Reason to Grant Certiorari

Petitioner claims the Fourth Circuit "improperly interpreted" *Graham*, but then concedes its wisdom:

> [b]y eliminating the subjective intent of the officer as an element of the cause of action, the Court created conformity in that each officer would be held to the same standard of reasonableness and would be found responsible whenever this standard is violated regardless of the officer's state of mind.

Petition at 8.

Petitioner then, both confusingly and contradictorily, claims that making an officer's subjective reason for deciding to use deadly force would promote, not undercut, the conformity sought and achieved by *Graham*. Contrary to Petitioner's assertion, such an approach would instead throw the courts into a morass of subjective evaluations thrust upon them constantly and needlessly. There is no compelling reason in *Graham* jurisprudence to subject

courts to such a tortuous and tenuous process.

This case provides a textbook example of the dangers of adopting Petitioner's rationale. Petitioner claims that the Fourth Circuit "erroneously held that a police officer's use of deadly force can be deemed reasonable based on a risk that the officer never saw, appreciated, perceived or thought to be true." Petition at 2.

In this case, Captain Windham saw Petitioner coming at him as he was trying to control a non-compliant female.[4] S.A. 193-95. Captain Windham explicitly contradicts Petitioner's assertion that he never perceived a risk. When Captain Windham turned away from the female and stepped towards Petitioner to control him, he felt his weapon being jostled or grabbed. S.A. 199-200, 202, 204, 205-06. Petitioner's hand was within inches of the muzzle of Captain Windham's weapon. S.A. 204, 213, 252UU. Captain Windham testified, "*At that time is when I felt like the situation – I figured that I was fixing to – that*

4

In serving a search warrant, "[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." *L.A. County v. Rettele*, 550 U.S. ___, 127 S. Ct. 1989, 1993, 167 L. Ed. 2d 974, 979 (2007) (citing *Michigan v. Summers*, 452 U.S. 692, 702-03, 101 S. Ct. 2587, 2594, 69 L. Ed. 2d 340 (1981)).

eminent [sic] danger was to my person, possibly death, so I fired the weapon in attempts to – to free myself from those two." S.A. 206 (emphasis added).

The Petition states that Captain Windham "testified that he never saw or thought that [Petitioner] was reaching towards him with arms outstretched." Petition at 2. This is untrue. In fact, when asked "Did [Petitioner] raise his arms like he was going to strike you at any point?", Windham responded, "He did raise his arms, but I don't recall how high. I do remember seeing his arms come up." S.A. 199.

Petitioner likewise claims that, according to Captain Windham, "[Petitioner] was walking towards him and was not running with his arms outstretched or acting aggressively in any manner." Petition at 4. Petitioner seriously distorts and twists Captain Windham's testimony. Captain Windham actually testified that Petitioner made a threatening movement towards him "[b]y coming towards me" but did not recall that Petitioner made any *other* threatening movement towards him. Captain Windham also stated that it did not appear that Petitioner was running but that Petitioner *did raise his arms*, "I do remember seeing his arms come up." S.A. 199.

Petitioner concedes this is a crucial point. The Petition acknowledges that the Fourth Circuit affirmed the district court's grant of summary judgment on the grounds that a reasonable officer might have believed that Petitioner, who claimed to be reaching towards a child to grab her, was reaching towards Captain Windham and thus posed a risk of serious harm. Petition at 2.

Petitioner himself testified that he was trying to catch the child, who was *running* by him. S.A. 252M-252N, 252P-252Q. Petitioner testified, "I remember . . . I were (sic) trying to **run** to grab her." S.A. 252N. When asked if "the first thing [Petitioner] did when he heard the flash bang was to run to get [the child]", Petitioner answered, "Yes." S.A. 252N. He testified the child was running from the living room to the back, *i.e.*, *running directly towards* and into the room that the officers were entering through the alternate breach. S.A. 252R. So despite his contrary protestations in his Petition,[5] Petitioner was both moving rapidly (in order to catch up with the running

---

5 This Court has recently re-affirmed that, in the context of summary judgment, not all factual disputes – even material ones – are "genuine," when a bare assertion by a non-moving party is "so utterly discredited by the record that no reasonable jury could have believed him." *Scott v. Harris*, 550 U.S. ___ , 127 S. Ct. at 1776, 167 L. Ed. 2d at 694.

child) in the direction of Captain Windham and had his hands out and was reaching. A reasonable officer could have reasonably perceived, correctly or not, that Petitioner was reaching for the officer even if Petitioner was in fact reaching for the child.

Petitioner inaccurately tells this Court, without any citation to matters of record, that other officers in the raid confirmed that Petitioner did not grab Windham's gun and that the female did not jump on Captain Windham's back. Petition at 4. Actually, they simply testified in their depositions that they could not see the confrontation between either Lakina and Captain Windham or Petitioner and Captain Windham. They certainly did not "confirm" Petitioner's claims.

In sum, Petitioner either misstates or twists the record to try to create an impression that Captain Windham's subjective intent was other than it was. Should the Court accept Petitioner's rationale for granting review, this is what judges will confront on a regular basis. This is the trap that *Graham's* objective reasonableness analysis is intended to avoid. This is exactly why this case presents no compelling reason to grant certiorari.

The Fourth Circuit Correctly Applied this Court's Decision in *Graham*

As *Graham* teaches, a claim that a law enforcement officer used excessive force in a seizure is analyzed under the "objective reasonableness" standard of the Fourth Amendment. 490 U.S. at 388, 109 S. Ct. at 1867. A law enforcement officer's actions are not excessive if they are "objectively reasonable" in light of the facts and circumstances confronting him, without regard to his underlying intent or motivation. *Id.* at 397, 109 S. Ct. at 1871.

To gauge objective reasonableness, a court examines only the actions at issue and measures them against what a reasonable police officer would do under the circumstances. *Rowland v. Perry,* 41 F.3d 167, 172 (4th Cir. 1994). Subjective factors involving the officer's motives, intent or propensities are not relevant. *Id.*, at 173. The immunity inquiry, however, must be filtered through the lens of the officer's perceptions at the time of the incident in question. *Id.*

Under this analysis, the court's proper inquiry is whether the officer's actions in using force alleged to be excessive are objectively reasonable in light of the facts and circumstances confronting the officer, *without regard to his underlying intent or motivation.* The "reasonableness" of a particular use of force must

be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. *Graham,* 490 U.S. at 396, 109 S. Ct. at 1872; *Rowland,* 41 F.3d at 173.

The "objective reasonableness" standard limits second-guessing of the reasonableness of actions. This standard also limits the need for decision-makers to sort through conflicting versions of the "actual" facts, and allows them to focus instead on what a reasonable officer would have perceived. The officer's subjective state of mind is not relevant, but his perceptions of the objective facts of the incident in question are. *Rowland* 41 F.3d at 173; *see also Schultz v. Braga,* 455 F.3d 470, 477 (4th Cir. 2006).

The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving– about the amount of force that is necessary in a particular situation. An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional. 490 U.S. at 396-97, 109 S. Ct. at 1872.

In *Graham*, this Court went so far as to reject the Court of Appeals' consideration of whether the individual officers acted in "good faith" or "maliciously and sadistically for the very purpose of causing harm" as incompatible with a proper Fourth Amendment analysis:

> We do not agree with the Court of Appeals' suggestion,. . ., that the "malicious and sadistic" inquiry is merely another way of describing conduct that is objectively unreasonable under the circumstances. Whatever the empirical correlations between "malicious and sadistic" behavior and objective unreasonableness may be, the fact remains that the "malicious and sadistic" factor *puts in issue the subjective motivations of the individual officers, which our prior cases make clear has no bearing on whether a particular seizure is "unreasonable" under the Fourth Amendment.*

Id. at 397, 109 S. Ct. at 1872-73 (internal citation omitted) (emphasis added).

In this case, Captain Windham perceived that his gun was threatened, and that he faced an imminent threat of serious physical harm. The Fourth Circuit properly analyzed the threat facing Captain

Windham under *Graham* and its progeny. As the Fourth Circuit correctly observed, consistent with *Graham*,

> "[s]ubjective factors involving the officer's motives, intent, or propensities are not relevant." *Rowland v. Perry*, 41 F.3d 167, 172 (4th Cir. 1994). The court looks at the officer's actions "in light of the facts and circumstances confronting [him], without regard to [his] underlying intent or motivation." *Graham v. Connor*, 490 U.S. 386, 388 (1989).

Slip op. at 10, n.9.

The Fourth Circuit noted that, "[a]lthough the immunity inquiry is objective, it 'must be filtered through the lens of the officer's perceptions at the time of the incident in question.' *Rowland*, 41 F.3d at 173. This allows the court to focus on what the officer 'reasonably perceived.'" Slip op. at 11.

The Fourth Circuit then properly applied *Graham*, by framing the test as

> whether a reasonable officer in Windham's position could have believed that his gun was threatened. The Court does not inquire whether Windham himself believed that his gun was

> threatened. Instead, the focus is on a hypothetical reasonable officer facing the same situation (reconstructed in [Petitioner's] favor) that Windham faced.

Slip op. at 12-13. Applying this test, the Fourth Circuit then concluded that a reasonable officer, forced to make a quick decision, could have reasonably concluded[6] that Petitioner posed an immediate threat of serious physical harm. *Id.* at 13-18.

Making an officer's subjective perceptions part of *Graham's* "objective reasonableness" inquiry would destroy the conformity and consistency sought by this Court's adoption of that standard and undo decades of precedent. It will cause courts at every level of the federal and state systems to second-guess law enforcement officers and to become, in effect, mind readers or diviners.

Petitioner's "horror story" that *Graham* might allow an officer to escape liability based on something he never saw, thought or believed to be true does not apply in this case. That hypothetical "horror story"

---

6 "[A] mistaken understanding of the facts that is reasonable in the circumstances can render a seizure based on that understanding reasonable under the Fourth Amendment." *Milstead v. Kilber*, 243 F.3d 157, 165 (4th Cir. 2001).

does not reflect the facts of this case.

Captain Windham had suddenly confronted a chaotic, tense, and volatile situation. He had attempted to subdue a difficult subject in Lakina, who was either on his back, or very close behind him, or to his side. Petitioner was advancing towards him with hands outstretched. Unchallenged forensic evidence established that Petitioner's hand was inches from Captain Windham's weapon when he fired. Captain Windham clearly perceived and believed that his gun was at risk. He testified he felt it being jostled and fired in response to that risk. "At that time is when I felt like the situation – I figured that I was fixing to – that eminent [sic] danger was to my person, possibly death, so I fired the weapon in attempts to – to free myself from those two." S.A. 206

The Fourth Circuit's application of *Graham's* "objectively reasonable" standard to the foregoing undisputed facts was appropriate, correct, and unremarkable. The Fourth Circuit properly analyzed and applied this Court's decision in *Graham*. Certiorari is therefore unwarranted.

Other Circuit Court Decisions Cited by Petitioner Do Not Conflict with the Fourth Circuit's Decision

Citing an unpublished 2007 decision of the Sixth Circuit, a 1994 decision of the Ninth Circuit, the dissent in an unpublished 1992 decision of the Ninth Circuit, and dictum from a 2003 decision of the Eleventh Circuit,[7] Petitioner contends, unpersuasively, that those other Circuit Court decisions are in conflict with the Fourth Circuit's decision in the present case.

Petitioner cites the Sixth Circuit's unpublished decision in *Murray-Ruhl v. Passinault*, 246 Fed. Appx. 338 (6th Cir. 2007). In *Murray-Ruhl*, the majority opinion reversed summary judgment for an officer who continued to shoot at a fleeing vehicle after it passed him by, hitting and killing the driver because "this record creates a dispute of fact concerning whether events unfolded as defendants claim . . . and whether *their actions can be said to have been objectively reasonable under those circumstances.*" *Murray-Ruhl*, 246 Fed. Appx. at 344 (emphasis added). *But see,*

---

7 *Murray-Ruhl v. Passinault*, 246 Fed. Appx. 338 (6th Cir. 2007) (unpublished); *Alexander v. San Francisco*, 29 F.3d 1355 (9th Cir. 1994); *Trahan v. City of Oakland*, 960 F.2d 152 (9th Cir. 1992) (unpublished); *Carr v. Tatangelo*, 338 F.3d 1259 (11th Cir. 2003).

Waterman v. Batton, 393 F.3d 471 (4th Cir. 2005) Similarly, the majority was concerned that "the reasonable of use of deadly force turns entirely on which version of the facts one accepts . . . [T]he district court simply failed to acknowledge the conflicts in the parties' allegations of fact concerning the reasonableness of [the officer's shooting]." *Id.* at 344-45.

The majority opinion draws these conclusions by applying not only *Graham* and its "objectively reasonable" test, but also the standard of *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 2771 (1986), that qualified immunity should not be granted "if, on an objective basis, it is obvious that no reasonably competent officer would have [shot the victim]" but should be granted "if officers of reasonable competence could disagree on this issue." *Murray-Ruhl* 246 Fed. Appx. at 343. Within this framework, which is entirely consistent with the Fourth Circuit's analysis in the present case, the majority opinion held that a jury could conclude that the officer could not *reasonably* have believed that the driver posed a danger. *Id.* at 344-45, 346

Among the evidence offered by plaintiff was forensic evidence that not one of the twelve shots fired by the officer struck the front or windshield of the

plaintiff's decedent's vehicle, and that eleven of the twelve shots fired at plaintiff's decedent's vehicle were fired after the vehicle had passed by the officer and while plaintiff's decedent was driving away from the officer. Plaintiff also offered eyewitness testimony that the officer yelled only once at plaintiff's decedent's vehicle to stop and without waiting, fired; and the officer ran after the vehicle and fired at it from behind. Plaintiff also offered an autopsy report, which determined that Plaintiff's decedent was shot from behind. In addition, testimony from the shooting officer's partner that he was not in the vehicle's path and that he never felt in danger of being struck by the vehicle contradicted the shooting officer's contention that he fired in defense of his partner. *Id.* at 341.[8]

Based on the foregoing evidence, the court held, not surprisingly, that the case presented "a situation in which there *is* a question regarding whether the officer reasonably could have believed that anyone's life was endangered . . . [A] jury could find that no reasonably competent officer would have shot the victim[.]" *Id.* at 346. (Emphasis in original).

---

8 The court also noted that the shooting officer called for an ambulance for himself and reported at the time of the incident and claimed for some days afterward that he had been hit by the plaintiff's decedent's vehicle, and that such report was a "complete fabrication". *Id.* at 340-41.

Petitioner's citation of *Murray-Ruhl* is more than merely in-passing strange because, in that case, the officer asserted he was *subjectively* in fear of serious injury. The Sixth Circuit, however, found disputed facts from which a jury could have concluded that a reasonable officer in that situation could not have *objectively* believed that anyone was in danger. Here, Petitioner asserts the opposite: that the Fourth Circuit's ruling that a reasonable officer in Captain Windham's situation could *objectively* have feared for his safety should be set aside because Petitioner contends, albeit incorrectly (see *supra* at 18-19, 27), that Windham did not *subjectively* perceive he was in danger. Petitioner is comparing "apples and oranges".

The appropriate comparison between "apples and apples" was made in *Murray-Ruhl* in Chief Judge Boggs' concurring opinion. He emphasized that "we look not to whether, in retrospect, [the driver] presented an *actual* danger, but whether, in the context of unfolding events, [the officer] could have *reasonably perceived* a danger." 246 Fed. Appx. at 348 (emphasis in original). The question of whether the officer in fact feared for his safety may have been disputed, but was "not material to the question of qualified immunity, which is concerned only with the objective reasonableness of the officer's actions, and not with his subjective state of mind." *Id.* at 349.

> [Plaintiff's] assertions that [the driver] did not in fact endanger the officers or anyone else, and that the [officer] did not in fact believe that he . . . was in danger, are not disputes material to the question of qualified immunity. If they were, any plaintiff in an excessive use of force claim could defeat summary judgment on qualified immunity grounds simply by asserting as a fact that the defendant did not have a requisite reasonable state of mind, or that the victim, in hindsight, did not in fact present a danger. On the contrary, the question of qualified immunity is a question of law that depends only on objective reasonableness, not on an actual danger or subjective state of mind.

Id., at 350.

Chief Judge Boggs accurately foresees that the new standard Petitioner urges would lead to abuse and manipulation. That is, itself, a sufficient reason to deny certiorari.

Petitioner cites *Alexander v. San Francisco*, 29 F.3d 1355 (9th Cir. 1994), *cert. denied*, 513 U.S. 1083; 115 S. Ct. 735; 130 L. Ed. 2d 638 (1995), and *Trahan v. City of Oakland*, 960 F.2d 152,1992 U.S. App. LEXIS 8566 (9th Cir. 1992), an unpublished opinion

from the Ninth Circuit as being in conflict with the Fourth Circuit opinion below. They are not.

Alexander is readily distinguishable. The 1994 decision focuses largely on the Fourth Amendment's warrant requirement. 29 F.3d at 1360-63. Insofar as it also, almost in passing, addresses excessive force under the Fourth Amendment, it stands only for the established proposition that the amount of force used must be commensurate with the circumstances creating the need for the force. *Id.* at 1366-67.

In *Alexander*, the majority opinion, over a vigorous dissent, focused on the propriety of police entering a house pursuant to a forcible entry administrative search warrant obtained by the local health department to inspect a serious sewage violation. The occupant, characterized as a "mentally ill, elderly, half-blind recluse", had not responded to multiple efforts to conduct an inspection of his premises, and when police showed up to assist in serving the forcible entry administrative search warrant, called out, "I'm going to get my gun and use it." After cordoning off the area and deploying a hostage negotiating team, who failed to get any response from the occupant, the police tactical squad entered the house. The occupant appeared at the top of a staircase holding a .22 caliber handgun. When the

police ordered the occupant to drop the gun, he said, "I told you I was going to use it" and pulled the trigger. Officers shot back, and the occupant died from gunshot wounds shortly thereafter. *Id.* at1357-58.

Both the majority and the dissent in *Alexander* acknowledged and conceded that, all other things being equal, the officers were *allowed* to employ deadly force against the occupant once he had confronted them with a drawn handgun. *Id.* at 1366, n.12. The dispute between the judges was entirely over whether the purpose of the police in *entering* the house was to arrest the occupant rather than to assist in service of the administrative search warrant. In the view of the majority, if the purpose was to effect an arrest, then the administrative search warrant did not authorize that action and the police would have been required to obtain an arrest warrant. *Id.* at 1360, 1364.

If the police entered to effect an arrest, the *Alexander* majority held the occupant's Fourth Amendment *warrant* rights would have been violated. *Id.* at 1360. The majority held that this factual dispute precluded summary judgment on qualified immunity for the individual officers at that stage.

In *Billington v. Smith*, 292 F.3d 1177 (9th Cir. 2002), the Ninth Circuit, commenting on *Alexander*,

stated:

> we held that if the police committed an independent Fourth Amendment violation by using unreasonable force to enter the house, then they could be held liable for shooting the man – even though they reasonably shot him at the moment of shooting – because they used excessive force in creating the situation which caused [the man] to take the actions he did.

292 F.3d at 1188 (quoting *Alexander*, 29 F.3d at 1366) (internal quotation marks omitted); *but see Drewitt v. Pratt*, 999 F.2d 774, 780 (4th Cir. 1993) (looking only to whether it was reasonable for police officer to shoot in the circumstances as they existed at that moment).

The *excessive force* Fourth Amendment claim, on the other hand, did not hinge on the officers' intent, but rather on the *reasonableness* of the force in making the entry: "The force which was applied must be balanced against the need for that force: it is the need for force which is at the heart of the consideration of the *Graham* factors." *Alexander*, 29 F.3d at 1367.

Just like the Fourth Circuit in the present case, the Ninth Circuit did not dispute that the officers were entitled to use deadly force once they were in the

residence and confronted with an individual who posed a threat to them of serious injury. "The excessive force claim turns on the force the officers used in entering the house, not on the force they used or didn't use once they had entered." *Id.* at 1366, n.12. The issue of force used in an entry, of course, is not relevant to the Fourth Circuit's decision in the present case.

The *Alexander* majority felt that a jury needed to determine the reasonableness of a SWAT team being deployed to *enter* the residence under the circumstances, not the level of force used once they were inside the residence. This Court has stated, however, that at the summary judgment stage, once a court has determined the relevant set of facts and drawn all inferences in favor of the nonmoving party to the extent supportable by the record, the reasonableness of an officer's actions "is a pure question of law." *Scott v. Harris*, 550 U.S. ___ n.8, 127 S. Ct. 1769, 1776, n.8, 167 L. Ed. 2d 686, 694 n. 8 (2007).

Alexander has occasionally been cited for the well-settled proposition that, in excessive force Fourth Amendment claims, the force applied must be balanced against the need for that force.[9] *See*,

---

9 *Vlasak v. Las Vegas Metro. Police Dep't*, 213 Fed. Appx. 512, 514 (9th Cir. 2006); *Gahn v. Fujino*, 1994 U.S.

Graham, 490 U.S. at 396, 109 S. Ct. at 1872. Research has disclosed no case citing *Alexander* for the proposition that an officer's subjective intent is relevant in analyzing an excessive force claim under *Graham's* "objective reasonableness" standard.

Trahan is inapposite. In *Trahan*, the majority held, and the dissent conceded, consistent with *Graham*, that "intent is not an element of [a] Fourth Amendment claim." 1992 U.S. App. LEXIS 8566 at *6. The dissent concedes this point, correctly observing that, "*Graham* teaches that a Fourth Amendment excessive force claim arising out of an arrest must be evaluated under an objective reasonableness standard . . . without regard to the officer's intent or motive " *Id.* at *13-*14. Thus, *Trahan* is consistent, not in conflict, with the Fourth Circuit's decision in the present case.[10]

App. LEXIS 30018 at *8 (9th Cir. 1994); *Logan v. City of Pullman*, 392 F. Supp. 2d 1246, 1261, 1262-63 (E.D. Wash. 2005); *Eason v. Anoka-Hennepin E. Metro Narcotics & Violent Crimes Task Force*, 2002 U.S. Dist. LEXIS 10645 at *12 (D. Minn. 2002).

10 The following passage from the dissent in *Trahan* does not suggest a conflict among circuits that would justify certiorari:

> Even though subjective motivation is immaterial, *Graham* notes that "evidence

Petitioner also cites dictum from *Carr v. Tatengelo*, 338 F.3d 1259 (11th Cir. 2003), that the reasonable inquiry should include the "reasonable apprehension" of officers in determining if force was excessive. Citation of dictum does not establish a conflict in precedent between circuits that would justify certiorari.

A close reading of *Carr*, however, makes clear that in this decision the Eleventh Circuit *agrees* completely with the Fourth Circuit. The excerpt cited by Petitioner is a footnote to a passage cited from *Graham* itself. That passage sets forth the familiar learning that "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the

---

> that the officer harbored ill-will" might properly be considered by the factfinder "in assessing the credibility of an officer's account." *Graham*, 490 U.S. at 399 n.12. This dictum means that even though intent is not an element of excessive force, evidence of intent may be relevant to whether objectively excessive force was used.
>
> 1992 U.S. App. LEXIS 8566 at *14-*15.

First, this passage is from the dissent, not, the majority opinion. Second, it refers to dictum. Third, it is not inconsistent with the Fourth Circuit's decision in this case, in that as noted, the majority and dissent both embrace the objective standard of *Graham*.

20/20 vision of hindsight." 338 F.3d at 1267-68. In this context, it is clear that the Eleventh Circuit footnote refers to the "reasonable apprehension" in a rapidly evolving situation of *a reasonable officer on the scene*. And the holding of Carr was that the officers in that case reasonably, *i.e.*, *objectively reasonably*, perceived that someone was pointing a gun and chambering a bullet at officer Tatangelo. In this case there is no conflict between the circuits; there is considerable congruence.

In sum, the cases relied upon by Petitioner do not demonstrate any conflict between the Fourth and any of the Ninth, Sixth or Eleventh Circuits, as Petitioner contends, and therefore do not support Petitioner's argument that certiorari should be granted.

CONCLUSION

This Court would do a disservice to decades of consistent *Graham v. Connor* jurisprudence were it to grant certiorari to review the Fourth Circuit's decision below. To do so would plunge judges into the slippery and evanescent task of evaluating, and judging, officers' intent and motivation. There is no compelling reason to do so. In any event, the Fourth Circuit appropriately applied *Graham* in an unremarkable manner that was fully justified by the record below. Finally, there is no conflict between the circuits on whether an officer's subjective intent should be

considered in applying the objectively reasonable test of *Graham* in excessive force claims.

WHEREFORE, Respondents respectfully pray that the petition for writ of certiorari be denied.

This the 21st day of April, 2008

MITCHELL BREWER RICHARDSON
Attorneys for Defendant Earl R. Butler

Ronnie M. Mitchell
North Carolina State Bar No.: 8423
225 Ray Avenue
Fayetteville, North Carolina 28304
Telephone: (910) 678-7100

FAISON & GILLESPIE
Attorneys for Defendant Larue Windham, Jr.

Reginald B. Gillespie, Jr.
North Carolina State Bar No.: 10895
Post Office Box 51729
Durham, North Carolina 27717
Telephone: (919) 489-9001

OFFICE OF THE COUNTY ATTORNEY
CUMBERLAND COUNTY
Attorneys for Respondents (Officially)

Harvey Raynor
North Carolina State Bar No.: 10009
Post Office Drawer 1829
Fayetteville, North Carolina 28302
Telephone: (910) 678-7762

93

(3)

No. 07-1012

FILED

APR 29 2008

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

CHARLES ALFORD,

Petitioner,

v.

CUYLER LARUE WINDHAM, JR., ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF

BRIAN D. ROGERS
Counsel of Record
MICHAEL L. GOLDBERG
ROGERS & GOLDBERG, LLC
3155 Roswell Road
Suite 330
Atlanta, Georgia 30305
(404) 846-5516

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

I. The Fourth Circuit Erroneously Held that the *Graham* Decision Prohibits an Inquiry into the Shooter's Reason for Using Force 1

II. The Officer's Explanation for the Use of Force Can Be Easily Determined by His Own Testimony 3

III. The *Graham* Decision Does Not Allow the Court to Ignore the Shooter's Explanation of the Reason for the Shooting 9

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Graham v. Connor, 490 U.S. 386 (1989).....1, 2, 9, 10

In their Brief in Opposition, Respondents incorrectly argue that Petitioner is asking this Court to overturn the *Graham v. Connor*, 490 U.S. 386 (1989), decision. (Brief in Opposition, p.16) On the contrary, Petitioner is requesting this Court to embrace the *Graham* decision and keep the Fourth Circuit from eroding away the protections provided by the holding in *Graham*. The Fourth Circuit has set a dangerous precedent by holding that an officer's reason for his use of force (i.e. why he pulled the trigger) is irrelevant and can be ignored in deciding the reasonableness of his actions.

I. The Fourth Circuit Erroneously Held that the *Graham* Decision Prohibits an Inquiry into the Shooter's Reason for Using Force

At oral argument, Judge Legg, who wrote the majority opinion for the Fourth Circuit in the present case, described his understanding of the reasonableness test outlined in *Graham* as follows:

> Qualified immunity is not the easiest concept in the world. So I was thinking about how does what Officer Windham was thinking at the time that he shot the plaintiff . . . and am I correct in assuming that you completely disregard what he said he was thinking and you place a reasonable officer in the position of Windham with all the physical things that were happening? And that in looking at the record most carefully or in the favor of Mr.

> Alford which would mean that nobody climbing on his back, you don't care about what he was thinking. You have a very confused situation. And from what I get from the record Mr. Alford moves towards whoever shot him with his hands reaching out and then he takes a blow and then he gets shot. So am I correct in saying that you don't look at the subjective thoughts of Windham? (Oral Arguments on May 22, 2007)

According to Judge Legg, the reason that Windham pulled the trigger has nothing to do with the analysis into the reasonableness of Windham's actions. "We take officer Windham sort of like you think of a movie scene with all these people. We take him out of the scene. We put him on the sideline." (Oral Arguments on May 22, 2007)

This is not the test that was intended by the *Graham* court. While the *Graham* decision did not explicitly deal with the relevance of the officer's explanation of the shooting to the reasonableness inquiry, it is implicit within the rationale behind the objective reasonableness test that the Court should examine whether the officer's explanation of the basis for the shooting is reasonable. Without such an inquiry, an officer would be allowed to escape liability based on something he never saw, thought or believed to be true. Under the holding in *Graham*, the Fourth Circuit should have looked at the reason that Windham pulled the trigger and determined if that explanation is objectively reasonable under the facts and circumstances of the case in addition to whether an

objectively reasonable officer would have used force under similar circumstances.

II. The Officer's Explanation for the Use of Force Can Be Easily Determined by His Own Testimony

Respondents argue that such a test would "cause courts at every level of the federal and state systems to second-guess law enforcement officers and to become, in effect, mind readers or diviners." (Brief in Opposition, p.26) But the officer himself would provide the explanation. At the officer's deposition, the plaintiff's lawyer would ask the officer, "Why did you shoot my client?" The officer would then testify as to why he pulled the trigger. That would be the explanation. There is no mind reading involved. It is just that simple.

Respondents argue that it would take "mind-reading, psychology, divination, and second-guessing" to figure out why the officer pulled the trigger and that the present case shows how a claimant can twist the facts to reach a certain result. According to Respondents, "Petitioner either misstates or twists the record to try to create an impression that Captain Windham's subjective intent was other than it was." (Brief in Opposition, p.21) But Windham's own testimony as to why he shot Charles Alford is unequivocal and is the sole basis for the explanation.

In the present case, Windham testified that Charles Alford was not running towards him.

Q: As he came towards you, do you recall whether he was walking, running or what his speed was?

A: No.

Q: Did it appear to you that he was running towards you?

A: No, it did appear for him to be running.

(Deposition of Cuyler Larue Windham, Jr. p.123 lns. 9 through 17)

As Windham approached Charles Alford, he felt someone jump onto his back.

Q: Okay, let me walk through that; all right, as you are approaching the large black male, you suddenly feel somebody – well, you suddenly feel a weight on your back, correct?

A: Yes.

Q: And in your mind, it – you feel like someone has, for a better term, jumped on your back –

A: Yes.

(Windham Depo. p.126 lns. 6 through 13)

Windham then reached around with his left hand onto the right side of Charles Alford's neck to try and push Alford to the ground.

Q: All right, and then when you felt the weight on your back, the first thing you

did was attempt to take with your left hand – assist the large black male to the ground, correct?

A: Yes.

Q: And tell me how it was that you would have done that? Would it have been the same as the large black female?

A: Except – except the opposite side; he was coming up to me basically how we're sitting, so I would have attempted to fend from his right side.

Q: In – in doing the large black female, you made it sound like you would have put your hand over her left shoulder and then on to the back of her neck and – and gone that way. With the large black male, would it have been over the right shoulder and hooking down?

A: Yes.

(Windham Depo. p.126 ln. 21 through p.127 ln. 13)

According to Windham, Charles Alford then resisted going onto the ground but was not fighting with Windham.

Q: All right, he was resisting your attempts to put him down, correct?

A: Yes.

Q: Other than resisting your attempts to put him down, did he do any other resistance?

A: I don't recall any.

Q: All right, he didn't do any hitting, correct?

A: I don't recall any.

Q: He didn't do any kicking, correct?

A: I don't recall any.

(Windham Depo. p.128 lns. 3 through 15)

According to Windham, Charles Alford then grabbed Windham's gun, and Windham pulled the trigger while Alford was still holding onto the weapon.

Q: Did he do any grabbing of you? Did he try to grab you in any manner?

A: My weapon.

Q: All right, when you say your weapon, are you saying that the large black male attempted to grab your weapon?

A: Yes.

Q: Did he have his hand on your weapon?

A: Yes.

Q: Did he have his hand on your weapon when it was fired?

A: Yes.

(Windham Depo. p.128 ln. 16 through p.129 ln. 2)

Windham feared for his safety and fired his weapon because Charles Alford was pulling on his gun, and Lakina Alford had jumped onto his back.

> Q: Sure; you just testified that the large black male had his hand on your gun and was attempting to get your weapon. I just want to know what it is that you did when he started trying to do that?
>
> A: Well, the – the black male pulling my weapon; the – the female, or whoever, was on my back, the weight. She was the only one there that I was aware of. At that time is when I felt like the situation – I figured that I was fixing to – that eminent danger was to my person, possibly death, so I fired the weapon in attempts to – to free myself from those two.

(Windham Depo. p.129 ln. 19 through p.130 ln. 5)

This is Windham's own explanation for why Charles Alford was shot. There is no need for interpretation, mind-reading or second-guessing. In a light most favorable to Charles Alford, this explanation is objectively unreasonable because Lakina Alford denies jumping on Windham's back, and Charles Alford denies ever reaching for or touching Windham's weapon. The testimony of John Leggette, the officer who entered the kitchen directly behind Windham, also contradicts Windham's story. According to Leggette, he entered the kitchen within seconds behind Windham but did not see any part of Windham's

claimed altercation with Lakina Alford and Charles Alford.

> Q: When you came into the kitchen area, Officer Windham had his hand on the large black female that was on the ground?
>
> A: He was kneeling down over her. And I don't know if his hand was on her or where his other hand was at. I just remember him kneeling down on her, kneeling down right where – with her right there. And I remember coming up and I tapped him on the back and said, go ahead; I got her; I got her.
>
> Q: Okay, at this time, what was the black male doing?
>
> A: He was over kind of rocking back and forth, laying kind of face down rocking back and forth
>
> . . . . .
>
> Q: When you came in, was there anything that indicated to you that a gun had been fired?
>
> A: I could smell the – the gun powder.

(Deposition of John Leggette p.37 ln. 13 through p.38 ln. 10)

The only way Legette could have failed to see the altercation described by Windham is if it never occurred.

III. The *Graham* Decision Does Not Allow the Court to Ignore the Shooter's Explanation of the Reason for the Shooting

The only way that the Fourth Circuit can find that Windham acted reasonably is to ignore Windham's explanation of why he shot Charles Alford and create its own theory of the shooting. And this is exactly what has occurred. In place of Windham's explanation for the shooting, the Fourth Circuit has created a scenario where a hypothetical reasonable officer could have hypothetically perceived that Alford was reaching towards his gun when Alford testified that he was reaching towards a child and hypothetically could have feared for his own safety and could have hypothetically acted reasonably in shooting Charles Alford. This is the epitome of second-guessing and hindsight that *Graham* is attempting to avoid. Only this time the second-guessing and hindsight is being used to help the officer escape liability.

Respondents claim that "Petitioner's 'horror story' that *Graham* might allow an officer to escape liability based on something he never saw, thought or believed to be true does not apply in this case." (Brief in Opposition, p.26) But this is exactly what is going to happen in this case and many more cases if this Court allows the erroneous test adopted by the Fourth Circuit to go unchallenged. Windham never claimed that he shot Charles Alford because he was running towards him with arms outstretched. That is an explanation that was created by the Fourth Circuit. Windham should not be allowed to rely upon a

"theory" of the shooting that he never believed to be true. Under the test created by the Fourth Circuit, the foundation of certainty and standards built by the *Graham* decision will be shaken and destroyed. In its place, the district court will be allowed to dismiss meritorious claims by finding, in hindsight and with unrestricted second-guessing, any action taken by a claimant at any time to excuse the use of deadly force by an officer, even though the action had no bearing on the shooter's decision to use force. Where will it stop if this Court accepts the Fourth Circuit's test as a correct interpretation of the *Graham* decision?

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

BRIAN D. ROGERS
Counsel of Record
MICHAEL L. GOLDBERG
ROGERS & GOLDBERG, LLC
3155 Roswell Road
Suite 330
Atlanta, Georgia 30305
(404) 846-5516

Attorneys for Petitioner